

ATTACHMENT 33

HIGHLY CONFIDENTIAL

Klump, Thomas

April 9, 2014

1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

- - -

IN RE: PROCESSED EGG PRODUCTS, : MDL NO. 2002
ANTI TRUST LITIGATION : 08-md-02002

THIS DOCUMENT RELATES TO, :
Kroger, Co. v. United Egg : HIGHLY
Producers, et al., : CONFIDENTIAL
No. 2:10-cv-06705 GP :
:

Videotaped deposition of THOMAS KLUMP,
held at the offices of DECHERT, CIRA Center 2929
Arch Street, Philadelphia, Pennsylvania 19104, on
Wednesday, April 9, 2014, beginning at approximately
9:16 a.m., the proceedings being recorded
stenographically by Gail Inghram Verbano, Registered
Diplomate Reporter, Certified Realtime Reporter,
Certified Shorthand Reporter-CA (No. 8635), and
transcribed under her direction.

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2 (Pages 2 to 5)

<p>2</p> <p>1 APPEARANCES:</p> <p>2 On Behalf of R. W. Sauder, Inc.:</p> <p>3 CHRISTINE LEVIN, ESQUIRE christine.levin@dechert.com</p> <p>4 CAROLYN E. ISAAC, ESQUIRE carolyn.issac@dechert.com</p> <p>5 DECHERT Cira Center 2929 Arch Street Philadelphia, Pennsylvania 19104-2808 215.994.4000</p> <p>6 On behalf of Krogers Co. and the witness:</p> <p>7 KEVIN J. MURRAY, ESQUIRE kmurray@kennynachwalter.com</p> <p>8 KENNY NACHWALTER 1100 Miami Center 201 South Biscayne Boulevard Miami, Florida 33131 308.373.1000</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>4</p> <p>1 On behalf of Michael Foods, Inc.:</p> <p>2 SHARON R. MARKOWITZ, ESQUIRE sharon.markowitz@stinsonleonard.com</p> <p>3 STINSON LEONARD & STREET 150 South Fifth Street Suite 2300 Minneapolis, Minnesota 55402 612.335.1500</p> <p>4</p> <p>5 ALSO PRESENT:</p> <p>6 William Verbano, Videographer</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>																																			
<p>3</p> <p>1 On Behalf of Midwest Poultry Services, L.P.:</p> <p>2 KATHY L. OSBORN, ESQUIRE kathy.osborn@faegrebd.com</p> <p>3 FAEGRE BAKER DANIELS, LLP 4 300 N. Meridian Street, Suite 2700 5 Indianapolis, Indiana 46204 6 317.237.8261</p> <p>7</p> <p>8 TELEPHONIC APPEARANCES:</p> <p>9 On behalf of Indirect Purchase Plaintiffs:</p> <p>10 PAUL NOVAK, ESQUIRE 11 pnovak@milberg.com</p> <p>12 MILBERG, LLP 13 One Kennedy Square 14 777 Woodward Avenue, Suite 890 15 Detroit, Michigan 48226 16 313.309.1763</p> <p>17 On Behalf of Rose Acre Farms, Inc.:</p> <p>18 MOLLY S. CRABTREE, ESQUIRE 19 mcrabtree@porterwright.com</p> <p>20 PORTER WRIGHT MORRIS & ARTHUR, LLP 21 41 South High Street 22 Columbus, Ohio 43215-6194 23 614.227.2015</p> <p>24</p> <p>25</p>	<p>5</p> <p>1 C O N T E N T S</p> <table> <thead> <tr> <th style="text-align: left;">WITNESS:</th> <th style="text-align: right;">PAGE</th> </tr> </thead> <tbody> <tr> <td>THOMAS KLUMP</td> <td></td> </tr> <tr> <td>By Ms. Levin</td> <td style="text-align: right;">9</td> </tr> <tr> <td>By Ms. Crabtree</td> <td style="text-align: right;">287</td> </tr> <tr> <td>By Mr. Novak</td> <td style="text-align: right;">289</td> </tr> <tr> <td>By Mr. Murray</td> <td style="text-align: right;">303</td> </tr> <tr> <td>By Ms. Levin</td> <td style="text-align: right;">305</td> </tr> </tbody> </table> <p>9</p> <p>10</p> <p>11 E X H I B I T S</p> <table> <thead> <tr> <th style="text-align: left;">EXHIBIT</th> <th style="text-align: left;">DESCRIPTION</th> <th style="text-align: right;">PAGE</th> </tr> </thead> <tbody> <tr> <td>Exhibit 41</td> <td>Signed acknowledgment and consent of Mr. Klump</td> <td style="text-align: right;">11</td> </tr> <tr> <td>Exhibit 42</td> <td>Presentation, "Retail Egg Buying," 5-11-10; KRGEGED-13608 to 639</td> <td style="text-align: right;">80</td> </tr> <tr> <td>Exhibit 43</td> <td>Addendum to Cal-Maine contract, 2-10-06; KRGEGL18832</td> <td style="text-align: right;">143</td> </tr> <tr> <td>Exhibit 44</td> <td>Packet of letters dated 9-6-06, from Mr. Klump to multiple recipients; KRGEGED-12637 to 2646</td> <td style="text-align: right;">145</td> </tr> <tr> <td>Exhibit 45</td> <td>Email communication, 2-15-07; KRGEGED-18589</td> <td style="text-align: right;">189</td> </tr> <tr> <td>Exhibit 46</td> <td>Email communication, 8-9-07; KRGEGED-18496</td> <td style="text-align: right;">195</td> </tr> </tbody> </table> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	WITNESS:	PAGE	THOMAS KLUMP		By Ms. Levin	9	By Ms. Crabtree	287	By Mr. Novak	289	By Mr. Murray	303	By Ms. Levin	305	EXHIBIT	DESCRIPTION	PAGE	Exhibit 41	Signed acknowledgment and consent of Mr. Klump	11	Exhibit 42	Presentation, "Retail Egg Buying," 5-11-10; KRGEGED-13608 to 639	80	Exhibit 43	Addendum to Cal-Maine contract, 2-10-06; KRGEGL18832	143	Exhibit 44	Packet of letters dated 9-6-06, from Mr. Klump to multiple recipients; KRGEGED-12637 to 2646	145	Exhibit 45	Email communication, 2-15-07; KRGEGED-18589	189	Exhibit 46	Email communication, 8-9-07; KRGEGED-18496	195
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<p style="text-align: center;">10</p> <p>1 co-packing agreement with Altienes with some salad 2 dressing that we had processed for them that -- 3 shelf life failed on the product.</p> <p>4 Q. Were you employed by Kroger at the time 5 of the deposition?</p> <p>6 A. Yes, ma'am.</p> <p>7 Q. Since it has been a while since you've 8 had your deposition taken, I'll go over a few rules 9 that I suspect Mr. Murray has gone over with you, 10 but just as a little refresher course, the first is 11 that the court reporter is taking down everything we 12 say, so we need to try not to talk at the same time. 13 Very difficult for her to take us both down at the 14 same time.</p> <p>15 The second is nods, hand gestures don't 16 get recorded, and so you need to give an oral 17 response to any question that I ask.</p> <p>18 The third is that if you have any 19 question, if you don't understand my question, if 20 you can't answer it as phrased and you want me to 21 rephrase it or to define a word in it, feel free to 22 ask me to do that. You don't have to accept the 23 question exactly as it's worded.</p> <p>24 And last, if you want to take a break, 25 as our videographer said, if you want to take a</p>	<p style="text-align: center;">12</p> <p>1 Q. And you have, in fact, read the 2 protective order and understand its terms?</p> <p>3 A. Yes.</p> <p>4 Q. Are you currently employed by Kroger?</p> <p>5 A. Yes.</p> <p>6 Q. How long have you been employed by 7 Kroger?</p> <p>8 A. 37 years.</p> <p>9 Q. And in terms of -- could you begin with 10 your current response at your current position and 11 work back in time?</p> <p>12 I don't know that I'll want to go all 13 the way back to the very beginning days, so we may 14 be able to short-circuit this if you just tell me 15 what your current position is and how long you've 16 held it, and then perhaps one position prior to 17 that.</p> <p>18 A. Current position is a global sourcing 19 manager for the corporate brands. Prior to that I 20 was a procurement manager for manufactured sourcing.</p> <p>21 Q. How long have you been the global 22 sourcing manager for Kroger?</p> <p>23 A. Two months.</p> <p>24 Q. And how long were you the procurement 25 manager for manufactured sourcing?</p>
<p style="text-align: center;">11</p> <p>1 break at any point in time, you just need to say so. 2 The tape -- we usually break every hour and a half 3 to two hours anyway for the tape, but if you want a 4 break prior to the time that the tape runs out, 5 you're free to do so. I would only ask that if 6 there's a question pending, that you give an answer 7 to the question before we take a break.</p> <p>8 A. Okay.</p> <p>9 Q. You understand all of that?</p> <p>10 A. Yes, I do.</p> <p>11 Q. Before I plunge into any kind of 12 substantive questioning, I believe part of the 13 deposition you were given a copy of the protective 14 order relating to confidentiality in the litigation; 15 and we asked that you sign an acknowledgment and 16 consent; and I would like to mark as Exhibit 17 Kroger 41 a copy of a document entitled 18 "Acknowledgment and Consent." 19 (Kroger Exhibit 41 was marked for 20 identification.)</p> <p>21 BY MS. LEVIN:</p> <p>22 Q. And I ask that you take a minute to 23 review that and tell me if that is your signature on 24 Exhibit 41.</p> <p>25 A. Yes, it is.</p>	<p style="text-align: center;">13</p> <p>1 A. Since April of 2005.</p> <p>2 Q. And what was your position prior to 3 procurement manager?</p> <p>4 A. Superintendent.</p> <p>5 Q. How long did you hold that position?</p> <p>6 A. Probably about five to seven years.</p> <p>7 Q. So from roughly 1998 or 2000?</p> <p>8 A. Yes.</p> <p>9 Q. Okay. Tell me what your 10 responsibilities were as superintendent.</p> <p>11 A. I was responsible for the management of 12 five processing lines at the State Avenue 13 manufacturing facility.</p> <p>14 Q. What products were being processed?</p> <p>15 A. There was a coconut department, a salad 16 dressing department, three salad dressing lines, and 17 a flavor room.</p> <p>18 Q. What was the last one?</p> <p>19 A. A flavor room.</p> <p>20 Q. Flavor room?</p> <p>21 A. Flavor, F-L-A-V-O-R, room.</p> <p>22 Q. And these were processing lines for 23 products that Kroger manufactures for sale?</p> <p>24 A. Yes, production of KMP products.</p> <p>25 Q. What is KMP?</p>

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<p style="text-align: center;">14</p> <p>A. Kroger manufactured products.</p> <p>Q. And these are all products sold under a Kroger brand?</p> <p>A. Kroger or other brands, yes.</p> <p>Q. Did any of the products that were a part of these five processing lines utilize eggs or egg products?</p> <p>A. Yes.</p> <p>Q. Which ones?</p> <p>A. The salad dressings in the -- when you're forming an emulsion or mayonnaise or salad dressing, it incorporates eggs. Also, any salad dressing that is emulsion base has egg products in it.</p> <p>Q. Were there any other products besides the ones you've listed that you were -- produced at the plant on State Avenue?</p> <p>A. No.</p> <p>Q. And were there any other products produced at that plant that use eggs or egg products?</p> <p>A. No.</p> <p>Q. In the salad dressings you described how eggs are used in the emulsion process.</p> <p>A. Yes, ma'am.</p>	<p style="text-align: center;">16</p> <p>actual processing?</p> <p>A. Some of the raw materials; yes.</p> <p>Q. And which raw materials were you the procurement manager for?</p> <p>A. When I took the role as procurement manager in 2005, I was buying all the chocolates, oats, and all the pet food items for the light dog food plant.</p> <p>Q. Did you have any responsibility for egg procurement?</p> <p>A. When I took the job, no.</p> <p>Q. After some period of time, did you have responsibilities for egg procurement?</p> <p>A. Yes.</p> <p>Q. What were those responsibilities?</p> <p>A. When Gary Stull retired, which was announced towards September/October of 2005, I volunteered to take the shell egg category, and that's my first introduction into eggs.</p> <p>Q. And was -- did you literally take over Mr. Stull's job in its entirety?</p> <p>A. Yes.</p> <p>Q. So that part of your responsibility was procuring eggs for resale in Kroger stores; is that correct?</p>
<p style="text-align: center;">15</p> <p>Q. Do you actually use eggs or egg products? Do you know the definition?</p> <p>A. Define "eggs or egg products."</p> <p>Q. I will use the definition of egg products that has been used in the litigation, specifically in the introduction in Paragraph 1 of the Complaint filed by Kroger in this case.</p> <p>It defines egg products as "eggs that have been removed from the shell and include whole eggs, whites, yolks, and various blends that may include some nonegg ingredients that are processed and sold in liquid, frozen and dried forms."</p> <p>A. Egg products.</p> <p>Q. But not any shell eggs?</p> <p>A. No.</p> <p>Q. Okay. Describe for me your responsibilities as procurement manager for manufactured sourcing.</p> <p>A. We have 39 manufacturing facilities operated by Kroger. And our responsibility was to buy the raw materials, both ingredients and packaging, to support those operations.</p> <p>Q. So instead of being a superintendent of the processing lines, in this position you were buying the raw materials that were used in the</p>	<p style="text-align: center;">17</p> <p>A. Shell eggs; correct.</p> <p>Q. But not egg products?</p> <p>A. No.</p> <p>Q. Who was in charge of procurement of egg products?</p> <p>A. In 2005 it was Mike Cornelius.</p> <p>Q. And how long had Mr. Cornelius had that job in 2005?</p> <p>A. I don't know.</p> <p>Q. Do you know do you know approximately?</p> <p>Five years? 10 years?</p> <p>A. No. He hadn't been employed by the company that long. I would say -- I don't know.</p> <p>Q. And how long did Mr. Cornelius hold the job of procurement of egg products?</p> <p>A. About three to six months after I took shell eggs.</p> <p>Q. So until early 2006?</p> <p>A. Yes.</p> <p>Q. And who took over for Mr. Cornelius in procurement of egg products?</p> <p>A. Jennifer Siewe.</p> <p>Q. And does Ms. Siewe still hold that position today?</p> <p>A. No.</p>

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<p>1 Q. How long did Ms. Siewe hold the 2 position? 3 A. As far as? 4 Q. Procurement of egg products. 5 A. Procurement -- she held the position... 6 Q. Roughly is good enough. I'm not going 7 to hold you to it. 8 A. Okay. I picked up the egg products 9 probably three or four years later. 10 Q. So you picked up procurement of egg 11 products in -- you say three or four years later? 12 A. Yes. 13 Q. In 2008/2009? 14 A. Yes. 15 Q. So until, until the last two months when 16 you became the global sourcing manager, until that 17 time, were you responsible for procurement of both 18 shell eggs and egg products? 19 A. Yes. 20 Q. Did your responsibilities change when 21 you became the global sourcing manager? 22 A. No. 23 Q. Just a new title? 24 A. Yes. They moved me from manufactured 25 sourcing to corporate brands.</p>	<p>18</p> <p>1 he left the company? 2 A. Yes. 3 Q. So you received whatever hard copy and 4 electronic files he still had in his possession? 5 A. Yes. 6 Q. Did Mr. Stull remain on as a consultant 7 of any sort -- 8 A. No. 9 Q. -- after he left? 10 A. No. 11 Q. No? 12 MR. MURRAY: Slow down a little. You 13 got to let her get the question out. 14 THE WITNESS: I'm sorry. 15 BY MS. LEVIN: 16 Q. It's one of the harder things that we 17 have to do. 18 Were you aware in advance of the filing 19 of the Complaint by Kroger in this action? 20 A. Be more specific. 21 Q. Did you know, before the Complaint was 22 filed in this action, that it was going to be filed? 23 A. No. 24 Q. Nobody consulted you with respect to the 25 allegations in the Complaint?</p>
<p>19</p> <p>1 Q. So you continued to be responsible for 2 shell egg and egg product procurement? 3 A. Yes. 4 Q. On a global basis? 5 A. That's what the title infers. 6 Q. Right. But by "global," does that just 7 mean throughout the United States? 8 A. For egg and egg products, yes. 9 Q. And when Mr. Stull left and you took 10 over his position, was there some sort of overlap 11 where he sort of showed you what he did and... 12 A. There was about a three-month overlap 13 between Gary's retirement and me picking the 14 position up. 15 Q. So if he retired in February of 2006, 16 then maybe in November or so you began to have some 17 overlap with him? 18 A. Probably October, November, December we 19 traveled together and visited each of our KMAs and 20 the supplier. 21 Q. What's a KMA? 22 A. Kroger marketing area. 23 Q. So these are regions of the country? 24 A. It's store regions, yes. 25 Q. Did you inherit Mr. Stull's files when</p>	<p>19</p> <p>1 A. No. 2 Q. And you didn't review the Complaint 3 prior to it being filed? 4 A. No. 5 Q. In your responsibilities -- and all I'm 6 really concerned about at this point is shell egg 7 and processed egg procurement -- to whom do you 8 report? 9 A. Today? 10 Q. Yes. 11 A. Allen Goss. 12 Q. How do you spell the last name? 13 A. G-O-S-S. 14 Q. What is Mr. Goss's position? 15 A. He's a senior manager. 16 Q. Does he have a more specific title than 17 senior manager? 18 A. Senior manager of global sourcing. 19 Q. Right -- global sourcing; right. 20 A. Yes. 21 Q. And how long have you reported to 22 Mr. Goss? 23 A. Two months. 24 Q. Prior to that, to whom did you report? 25 A. I've been moved around a lot. I'm</p>

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<p style="text-align: center;">22</p> <p>1 trying to remember the order in which they...</p> <p>2 John Hitchell.</p> <p>3 Q. And what was Mr. Hitchell's position?</p> <p>4 A. He was a senior manager of dairy.</p> <p>5 Q. How long did you report to Mr. Hitchell?</p> <p>6 A. About a year.</p> <p>7 Q. And do you recall who you reported to</p> <p>8 prior to Mr. Hitchell?</p> <p>9 A. Shawn Dailey.</p> <p>10 Q. And that's Mr. Dailey? I made this</p> <p>11 mistake once yesterday with Erin somebody. Is it --</p> <p>12 Mr. Shawn Dailey is a man?</p> <p>13 A. Yes, Mr. Shawn Dailey.</p> <p>14 Q. And how long did you report to</p> <p>15 Mr. Dailey?</p> <p>16 A. I believe about a year and a half to two</p> <p>17 years.</p> <p>18 Q. What was Mr. Dailey's position?</p> <p>19 A. Commodity -- senior manager commodities.</p> <p>20 Q. And do you recall who you reported to</p> <p>21 prior to that?</p> <p>22 A. Dallas Lindley.</p> <p>23 Q. And?</p> <p>24 A. Senior manager of ingredients.</p> <p>25 Q. And how long did you report to --</p>	<p style="text-align: center;">24</p> <p>1 only one page long.</p> <p>2 And if you could take a look at Kroger</p> <p>3 Exhibit 2, I'll then have a few questions about it.</p> <p>4 THE WITNESS: Yes.</p> <p>5 BY MS. LEVIN:</p> <p>6 Q. Do you recognize Exhibit 2?</p> <p>7 A. Yes.</p> <p>8 Q. And what is it?</p> <p>9 A. It is the defendant's amended notice of</p> <p>10 deposition of the plaintiff, the Kroger Company,</p> <p>11 pursuant to Fed or CIVP 30(b)(6).</p> <p>12 Q. Do you understand that you're here today</p> <p>13 to testify as the corporate rep, representative of</p> <p>14 Kroger on certain topics?</p> <p>15 A. Yes.</p> <p>16 Q. I'd ask that you turn to Page 4 of the</p> <p>17 deposition notice and tell me which topics you are</p> <p>18 testifying on behalf of Kroger.</p> <p>19 Page 4 of the -- that's the certificate</p> <p>20 of service, I'm sorry. There's going to be another</p> <p>21 Page 4.</p> <p>22 A. Okay.</p> <p>23 Q. Keep turning.</p> <p>24 A. Thank you. And your question is?</p> <p>25 Q. Which of the topics, beginning on Page 4</p>
<p style="text-align: center;">23</p> <p>1 A. They each had about a two-year stint.</p> <p>2 Q. Okay. But these were all the people</p> <p>3 that you reported to with respect to your</p> <p>4 responsibilities on procurement of shell eggs and</p> <p>5 egg products?</p> <p>6 A. Yes.</p> <p>7 Q. And during this time period that you</p> <p>8 were in charge of shell egg and egg product</p> <p>9 procurement, I believe you testified that that was</p> <p>10 for resale in Kroger stores; correct?</p> <p>11 A. For the retail shell eggs, yes. For the</p> <p>12 egg products, it was for manufacturing.</p> <p>13 Q. And did you have any involvement with</p> <p>14 purchasing shell eggs for use in manufacture?</p> <p>15 A. We do not use shell eggs in</p> <p>16 manufacturing.</p> <p>17 Q. So all of the egg ingredients in</p> <p>18 Kroger-produced products are egg products as opposed</p> <p>19 to shell eggs?</p> <p>20 A. Yes.</p> <p>21 Q. You have in front of you a pile of</p> <p>22 exhibits, and those are from yesterday; and they are</p> <p>23 in reverse numerical order.</p> <p>24 If you could dig down to No. 2; which is</p> <p>25 really down at the bottom. The first exhibit was</p>	<p style="text-align: center;">25</p> <p>1 and running through Page 15 are you testifying on</p> <p>2 behalf of Kroger for?</p> <p>3 A. Questions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10,</p> <p>4 11, 12, 15, 17, 24, 25 --</p> <p>5 Q. Can you slow down a minute. 11, 12, 15,</p> <p>6 17?</p> <p>7 A. 24, 25, 28, 29, 30, 31, 32.</p> <p>8 As far as Question 1, it's A through F.</p> <p>9 Q. Are you the designee for Topic 33?</p> <p>10 A. Oh, excuse me, yes.</p> <p>11 Q. What generally did you do to prepare for</p> <p>12 your testimony today?</p> <p>13 A. Spent many hours reviewing documents,</p> <p>14 talking to various people throughout our</p> <p>15 organization.</p> <p>16 Q. What kinds of documents did you review?</p> <p>17 A. Reviewed the Complaint. I read Gary</p> <p>18 Stull's deposition; assignment of claims; disclosure</p> <p>19 review; looked at emails, PowerPoints from files;</p> <p>20 some old presentations, contracts, two of the</p> <p>21 interrogatory responses; deposition notice; the 2002</p> <p>22 press release; the Web site of Kroger and UEP; and</p> <p>23 the purchase data.</p> <p>24 Q. Okay. We may have get into some of that</p> <p>25 in a little bit more detail as we go forward.</p>

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<p style="text-align: right;">26</p> <p>1 How many hours did you spend reviewing 2 these documents?</p> <p>3 A. I would say upwards of 30 plus.</p> <p>4 Q. And to whom did you speak?</p> <p>5 A. In our organization, in outside 6 organization, I spoke to Payton Pruett, Frank Crea, 7 Ross Kramer, Randy Payne, Becky Bradley.</p> <p>8 Q. Anyone else?</p> <p>9 A. Lisa Beth Miller, Jennie Betz, Phil 10 Laughlin, Phil Pugh, and Kevin Murray.</p> <p>11 Q. Who was the one before Phil Pugh?</p> <p>12 A. Phil Laughlin.</p> <p>13 Q. What did you discuss with Mr. Pruett?</p> <p>14 A. Mr. Pruett, I discussed the case, what 15 the case was about.</p> <p>16 Q. What did Mr. Pruett tell you?</p> <p>17 A. He didn't have a whole lot of input.</p> <p>18 Q. How long did you speak with him?</p> <p>19 A. With Mr. Pruett?</p> <p>20 Q. Right.</p> <p>21 A. Probably an hour or so.</p> <p>22 Q. Well, what more did he say than he 23 didn't have a lot of input?</p> <p>24 A. Well, it was more me telling him what my 25 role was with what my job responsibilities were in</p>	<p style="text-align: right;">28</p> <p>1 developed by FMI.</p> <p>2 Q. The criteria for the animal welfare 3 guidelines?</p> <p>4 A. Yes, UEP guidelines.</p> <p>5 Q. Did he tell you anything else?</p> <p>6 A. No.</p> <p>7 Q. What is Mr. Crea's position?</p> <p>8 A. Frank Crea is a global sourcing manager; 9 and he does the GNX and IASTA bids. They're two 10 bidding metrics that Kroger uses to bid business.</p> <p>11 Q. And does Mr. Crea do that for egg 12 procurement?</p> <p>13 A. He did his first one last week.</p> <p>14 Q. His first what last week?</p> <p>15 A. His first bid for shell eggs.</p> <p>16 Q. So prior to last week, Mr. Crea had 17 never done any sort of bid for shell eggs?</p> <p>18 A. No.</p> <p>19 Q. Can you explain for us what GNX is.</p> <p>20 A. No. It's an acronym for -- but I don't 21 remember what the acronym is.</p> <p>22 Q. Beyond what it is an acronym for, what 23 is GNX?</p> <p>24 A. It's a metrics to bid. It's an online 25 bidding process.</p>
<p style="text-align: right;">27</p> <p>1 this case.</p> <p>2 Q. How did that help you prepare for your 3 testimony today?</p> <p>4 A. I don't know.</p> <p>5 Q. So did Mr. Pruett give you any 6 information that you needed in order to testify 7 today?</p> <p>8 MR. MURRAY: Objection; calls for 9 speculation. He doesn't know what he needs until 10 the questions are asked.</p> <p>11 THE WITNESS: I don't know.</p> <p>12 BY MS. LEVIN:</p> <p>13 Q. So what did -- other than you telling 14 Mr. Pruett what you did, what did Mr. Pruett tell 15 you?</p> <p>16 A. Well, there was discussion about the 17 animal welfare, UEP.</p> <p>18 Q. What did Mr. Pruett tell you that those 19 subjects?</p> <p>20 A. That they were members of FMI.</p> <p>21 Q. Anything else?</p> <p>22 A. No.</p> <p>23 Q. So what did he tell you about the animal 24 welfare and UEP?</p> <p>25 A. He was saying that the UEP criteria was</p>	<p style="text-align: right;">29</p> <p>1 Q. And what is IASTA?</p> <p>2 A. IASTA is an online bidding process as 3 well.</p> <p>4 Q. How do the two differ; do you know?</p> <p>5 A. I do not know.</p> <p>6 Q. Are they both used today for shell eggs?</p> <p>7 A. No. GNX was replaced by IASTA.</p> <p>8 Q. So when did that happen?</p> <p>9 A. Probably about a year ago.</p> <p>10 Q. So until about a year ago, GNX was the 11 metric used for online bidding for shell eggs?</p> <p>12 A. No. It had been used; but I never used 13 it.</p> <p>14 Q. Well -- but the company used GNX?</p> <p>15 A. The company used it on one bid, yes, 16 that I'm aware of.</p> <p>17 Q. So what did you -- prior -- in the 18 entirety of the time period that Kroger has used GNX 19 as its metric for online bidding, it's been used 20 once for shell egg procurement?</p> <p>21 A. Yes.</p> <p>22 Q. And what about IASTA?</p> <p>23 A. IASTA was, like I responded earlier, it 24 was used for the first time within the last three, 25 three or four weeks.</p>

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<p style="text-align: right;">30</p> <p>1 Q. What did you learn from Mr. Crea?</p> <p>2 A. Talked to Frank about the liquid eggs</p> <p>3 more than shell eggs, and they had bids in prior</p> <p>4 years with the liquid egg products.</p> <p>5 Q. Using GNX?</p> <p>6 A. Using GNX.</p> <p>7 Q. So GNX had been used in prior years for</p> <p>8 liquid eggs and only once for shell eggs?</p> <p>9 A. Yes.</p> <p>10 Q. Do you know what methodology or what</p> <p>11 metric was used for shell eggs other than this one</p> <p>12 occasion where GNX was used?</p> <p>13 A. Yes.</p> <p>14 Q. What was that?</p> <p>15 A. It was -- we would send out RFQs,</p> <p>16 requests for quotes, to various producers; and then</p> <p>17 we would assemble the results, and then we would</p> <p>18 analyze them and award the business.</p> <p>19 Q. And what period of time were RFQs used</p> <p>20 to solicit bids for shell eggs?</p> <p>21 A. We started our first one in 2007 through</p> <p>22 present, until the IASTA bid.</p> <p>23 Q. So you would receive the results for an</p> <p>24 RFQ and then decide to whom to award the business?</p> <p>25 A. Yes, ma'am.</p>	<p style="text-align: right;">32</p> <p>1 Q. What does Kroger use or what did Kroger</p> <p>2 use the GNX metric for?</p> <p>3 A. The one that I'm familiar with is they</p> <p>4 used it to bid the Fry's business at Thompson</p> <p>5 warehouse.</p> <p>6 Q. That's for the one occasion you know</p> <p>7 where they used it for shell eggs?</p> <p>8 A. Yes, yes.</p> <p>9 Q. Did Kroger use GNX for procurement of</p> <p>10 other products?</p> <p>11 A. Yes.</p> <p>12 Q. Do you know which ones?</p> <p>13 A. Many.</p> <p>14 Q. Many.</p> <p>15 A. Yes.</p> <p>16 Q. Do you know why it was not used for</p> <p>17 shell eggs other than this one occasion?</p> <p>18 A. Because I preferred -- well --</p> <p>19 Q. For you.</p> <p>20 A. For me, because I preferred not to use</p> <p>21 it.</p> <p>22 Q. Why is that?</p> <p>23 A. It's just -- it just wasn't a metrics</p> <p>24 which I thought would give us the most competitive</p> <p>25 bid.</p>
<p style="text-align: right;">31</p> <p>1 Q. Prior to 2007, how did you solicit bids?</p> <p>2 A. With our main producer, Midwest Poultry,</p> <p>3 which about a third of our business. We were on a</p> <p>4 cost-plus pricing metrics.</p> <p>5 Q. And what about the other two-thirds of</p> <p>6 the business?</p> <p>7 A. I'm not sure what pricing or what -- how</p> <p>8 Gary Stull went out for bid on his. I found nothing</p> <p>9 in his records, except the one GNX, that he would</p> <p>10 solicit the producers for a price quote.</p> <p>11 Q. So do you know how Mr. Stull went about</p> <p>12 obtaining bids for the provision of shell eggs to</p> <p>13 Kroger?</p> <p>14 A. No.</p> <p>15 Q. When you read his deposition, did that</p> <p>16 provide you with any further information on that</p> <p>17 subject?</p> <p>18 A. No.</p> <p>19 Q. When you took over egg procurement from</p> <p>20 Mr. Stull, did you discuss how he was going about</p> <p>21 obtaining bids for shell eggs?</p> <p>22 A. No.</p> <p>23 Q. You just know that contracts were</p> <p>24 awarded somehow?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">33</p> <p>1 Q. And why did you think it would not give</p> <p>2 you the most competitive bid?</p> <p>3 A. Because of the way it was -- the</p> <p>4 impersonal nature which it was used. It was an</p> <p>5 online one-shot bidding process that I get feedback</p> <p>6 from the producers that it -- it did not lend itself</p> <p>7 to be very user friendly.</p> <p>8 Q. So through GNX, a shell egg producer,</p> <p>9 for instance, would have one opportunity to put in</p> <p>10 its bid for whatever bids were being sought for, for</p> <p>11 whatever kinds of shell eggs were being -- bids were</p> <p>12 being sought for, and then there was no ability to</p> <p>13 change that bid?</p> <p>14 A. Correct.</p> <p>15 Q. So it was -- okay.</p> <p>16 And you preferred to use a methodology</p> <p>17 where shell egg producers could change their bid in</p> <p>18 response to what other producers had bid?</p> <p>19 A. We always -- with my bidding process,</p> <p>20 the incumbent has always a right to rebid if they</p> <p>21 were outbid.</p> <p>22 Q. And you believe this results in Kroger</p> <p>23 obtaining a more competitive bid?</p> <p>24 A. Yes.</p> <p>25 Q. Do you know whether the process that</p>

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<p style="text-align: center;">34</p> <p>1 Mr. Stull used, whatever it may have been, enabled 2 bidders to see what others were bidding and adjust 3 their bid accordingly?</p> <p>4 A. I don't know.</p> <p>5 Q. Do you know whether Mr. Stull's process 6 allowed Kroger to obtain the most competitive bid 7 possible?</p> <p>8 A. I do not know.</p> <p>9 Q. What did Mr. Crea tell you? What did 10 you learn from him?</p> <p>11 A. Frank commented that they had bid out 12 the liquid egg process one or two times, in his 13 recollection.</p> <p>14 Q. Using GNX or bid it out -- let it out, 15 period?</p> <p>16 A. Bid it out with GNX.</p> <p>17 Q. Did you learn anything from Mr. Crea 18 about other ways in which liquid egg bids were 19 solicited if not through GNX?</p> <p>20 A. No.</p> <p>21 Q. What about Ross Crane?</p> <p>22 A. Ross Kramer.</p> <p>23 Q. Kramer. Can't read my own writing. 24 What is his position?</p> <p>25 A. Ross Kramer is -- or was the category</p>	<p style="text-align: center;">36</p> <p>1 Q. Or it may sell under the Kroger label.</p> <p>2 A. Correct.</p> <p>3 Q. But not both in the same store; is that 4 correct?</p> <p>5 A. Correct.</p> <p>6 Q. Do you know which stores have their own 7 label for shell eggs?</p> <p>8 A. Yes.</p> <p>9 Q. And which are they?</p> <p>10 A. Fred Meyers has a Fred Meyers brand.</p> <p>11 QFC, QFC brand. King Soopers has their King Sooper 12 City Market brand. Ralphs up till last year had a 13 Ralphs brand. I transferred them over to the Kroger 14 brand; as well as Food-4-Less had their own banner 15 brand, I moved them to Kroger.</p> <p>16 Smith's currently has their own banner 17 brand, as well as Fry's. Dillons has their banner 18 brand as well, and then the Kroger east divisions 19 are all under the Kroger label.</p> <p>20 Q. So other than the Ralphs and 21 Food-4-Less, which you say you moved to a Kroger 22 label recently --</p> <p>23 A. Yes.</p> <p>24 Q. -- was your testimony with respect to 25 each of these banners and the types of eggs that</p>
<p style="text-align: center;">35</p> <p>1 manager for the dairy, dairy case.</p> <p>2 Q. And what does a category manager do?</p> <p>3 A. He's responsible for national and banner 4 products that are in the dairy case.</p> <p>5 Q. Does that include shell eggs and egg 6 products?</p> <p>7 A. Yes.</p> <p>8 Q. And when you say national products and 9 banner products, what are you referring to?</p> <p>10 A. Banner product is a store-labeled 11 product. National products are your Eggland's Best, 12 Land O' Lakes, Farmhouse. Products that are sold 13 through multiple retail chains and not retail-chain 14 specific.</p> <p>15 Q. Now, when you say a banner, can you 16 explain what you mean by that.</p> <p>17 A. The banner is either the Kroger banner 18 product or Krogers subsidiaries, which could be King 19 Soopers, Ralphs, Food-4-Less, Cala/Bell, Foods Co., 20 Fred Meyers, QFC.</p> <p>21 Q. You know them all.</p> <p>22 A. Yes, ma'am.</p> <p>23 Q. And so each of those banner stores may 24 have its own label under which it sells shell eggs?</p> <p>25 A. Yes.</p>	<p style="text-align: center;">37</p> <p>1 they sell, would that be true from 2000 to the 2 present?</p> <p>3 A. Yes.</p> <p>4 Q. So what are Mr. Kramer's 5 responsibilities as category manager?</p> <p>6 A. His responsibilities are item selection, 7 planograms in the sourcing of national products.</p> <p>8 Q. And specifically with respect to shell 9 eggs, how do those three activities, item 10 collection, planograms, and sourcing play out?</p> <p>11 A. He does no sourcing for banner products. 12 I do all the sourcing for banner.</p> <p>13 Q. So --</p> <p>14 A. His is just sourcing for national -- I'm 15 sorry.</p> <p>16 Q. So he does the sourcing for Eggland's 17 Best and Land O' Lakes and other national brands?</p> <p>18 A. Yes.</p> <p>19 Q. And by "sourcing," do you mean 20 procurement?</p> <p>21 A. He -- yes.</p> <p>22 Q. And can you continue. I'm sorry.</p> <p>23 A. With?</p> <p>24 MR. MURRAY: Was there a pending 25 question?</p>

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<p style="text-align: right;">38</p> <p>1 BY MS. LEVIN: 2 Q. Yes, there was a pending question. I 3 asked him how item selection, planograms, and 4 sourcing of national products played out with 5 respect to shell eggs; and he's answered me with 6 respect to sourcing.</p> <p>7 A. One more time so I understand the 8 question.</p> <p>9 Q. Well, what do planograms have -- what 10 does he do with respect to shell eggs and a 11 planogram?</p> <p>12 A. Facings in the egg case. He decides if 13 Eggland's Best gets one facing or two facing. 14 He looks at the store movement. They 15 have a criteria on planograms where they try not 16 to -- a higher-moving item will get more facings 17 for --</p> <p>18 Q. So by "facings" --</p> <p>19 MR. MURRAY: You have to let him finish.</p> <p>20 BY MS. LEVIN:</p> <p>21 Q. Go ahead.</p> <p>22 A. For restocking purposes, because they 23 don't want, in the middle of the day, the shelf to 24 be empty if it's a high-turn item.</p> <p>25 So they try to balance the case that</p>	<p style="text-align: right;">40</p> <p>1 account demand for various shell egg types? 2 A. Absolutely. 3 Q. And do the planograms vary by banner? 4 A. Yes. 5 Q. Do they vary within banner by store? 6 A. Yes. 7 Q. And again, that's all based on the 8 demand that's being experienced at that particular 9 store? 10 A. Yes. We have over 6,000 egg planograms 11 in our stores. 12 Q. That's a lot. 13 A. Yes. 14 Q. So the demand for Eggland's Best may be 15 different at a Dillons store than it is at a Fred 16 Meyers? 17 A. Yes. It may be different at a Dillons 18 Marketplace versus a Dillons mainstream versus a 19 Dillon value store. 20 Q. Okay. And item selection you mentioned, 21 what does he have to do with item selection and 22 shell eggs? 23 A. If a national brand has a new item that 24 they would like to introduce into the Kroger system, 25 in the dairy section, he is the person that they do</p>
<p style="text-align: right;">39</p> <p>1 they have the right balance of products and the 2 right amounts to meet the customers' needs.</p> <p>3 Q. So a planogram is essentially a 4 decision-making as to how much space and what space 5 a particular product will receive on the shelf?</p> <p>6 A. Correct.</p> <p>7 Q. And so he decides how much space to 8 dedicate, for example, to Eggland's Best versus 9 Fry's eggs?</p> <p>10 A. Correct.</p> <p>11 Q. What did you learn from Mr. Kramer about 12 that particular issue in terms of planning for space 13 for shell eggs?</p> <p>14 A. Well, we went through the planogram. He 15 showed me there's a system they use that pulls the 16 data from our system that tells them the turn rates 17 and how many times it would have to be restocked 18 during the day before that in how the -- depending 19 on the facing and the placements, what they want to 20 showcase, whether they're going to put it on top 21 shelf, middle shelf, you know, and the higher 22 turn -- your higher-turn volumes are in your lower 23 cases because they're typically in your larger 24 packs, your 24 counts versus your 12 counts.</p> <p>25 Q. So the planogram has to take into</p>	<p style="text-align: right;">41</p> <p>1 their sales pitch to in order to get the opportunity 2 to introduce that item.</p> <p>3 Q. So if I am a distributor for Eggland's 4 Best, for instance, and I want to get into a Dillons 5 store or a King Sooper store, Mr. Kramer is the man 6 I need to talk to?</p> <p>7 A. Yes.</p> <p>8 Q. Regardless of where that store is?</p> <p>9 A. Yes.</p> <p>10 Q. Do you know how many stores or how many 11 banners carry Eggland's Best?</p> <p>12 A. All our Kroger stores carry the 13 Eggland's Best.</p> <p>14 Q. Regardless of the banner?</p> <p>15 A. Yes. But let me clarify: All the 16 stores in that KMA may not carry the Eggland's Best 17 banner. If you have a Mercado store in Fry's in 18 Tulsa or Scottsdale, Arizona, it may not carry an 19 Eggland's Best product, or if it's a value store.</p> <p>20 Q. So all of -- each banner may carry 21 Eggland's Best but not necessarily in each of its 22 stores?</p> <p>23 A. Correct.</p> <p>24 Q. Do you know why that is?</p> <p>25 A. Customer preference, what the customer's</p>

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<p style="text-align: right;">42</p> <p>1 going to buy. If you're in a value store and 2 they're buying value product, they typically don't 3 source the high-end product. 4 So if the Dunnhumby data says that they 5 sell very few units in that store, then they do not 6 stock it in that store, they stock other products 7 that the consumer would want to buy. 8 Q. And so the planograms and item selection 9 are all about responding to the consumer demand? 10 A. Yes. 11 Q. With respect to egg products, do you 12 know what brand of egg products Kroger stores sell? 13 A. Yes. 14 Q. What brand is that? 15 A. We sell the Egg Beaters, the Papetti's 16 and the Kroger brand. 17 Q. Are there any other brands of egg 18 products that Kroger or its banner stores sell? 19 A. Not that I'm aware of. 20 Q. And do they sell each of those three 21 brands at all of the different banner stores? I 22 don't mean all of the stores, but do each of the 23 banners sell all of those three products? 24 A. Yes. 25 Q. But not every store has all three</p>	<p style="text-align: right;">44</p> <p>1 Q. And does his job responsibility entail 2 shell eggs as well as egg products? 3 A. Yes. 4 Q. And what does he do with respect to 5 shell eggs? 6 A. His focus was pretty much on planning 7 and featuring shell eggs. He had nothing to do with 8 sourcing. 9 Q. So he decides -- well, why don't you 10 describe for me what "planning and featuring shell 11 eggs" means. 12 A. What Randy would do is write a -- say 13 the Kroger initiative was to feature eggs once a 14 period. And a period is a four-week time frame. We 15 would have 13 periods in a year. 16 He would write a tentative feature for 17 12-count large for all the KMAs, and then he would 18 communicate that to the category manager, which 19 would send it out to the merchandisers and the KMAs 20 to get their buy-in for a feature. 21 Q. So when you say a tentative feature for 22 12-count for all KMAs, can you -- first of all, KMA 23 as you've told us is Kroger marketing area? 24 A. Yes. 25 Q. And what do you mean by a tentative</p>
<p style="text-align: right;">43</p> <p>1 products? 2 A. Yes. 3 Q. Is there one product that you're aware 4 of that's more popular than the others? 5 A. The best-selling one right now is the 6 32-ounce egg whites, which we don't carry in the 7 Kroger brand. We sell the 16-ounce, but we don't 8 carry a 32. But we're introducing it soon. 9 Q. Because it's a good seller? 10 A. Yes; because it's become popular. 11 Q. What about Randy Payne? What does 12 Mr. Payne do? 13 A. Randy Payne was in Kroger in 2007/2008. 14 Formed a corporate brands group. 15 Prior to that time frame, Kroger never 16 had any group that would promote its own banner 17 product. It would just be an offering to them. 18 Kroger realized that there was a deficit 19 at that time, because we had national sales accounts 20 that had sales reps that would rep their product and 21 promote their product. 22 We at the Kroger Company had nothing to 23 promote our own products. So they formed the 24 corporate brands group in that 2007/2008. And Randy 25 was the category manager for corporate brands.</p>	<p style="text-align: right;">45</p> <p>1 feature for a 12-count large eggs? 2 A. KMAs are not required to follow Kroger 3 mandate for featuring. It's suggested but not 4 mandated. 5 So Randy would write a sales plan to 6 promote a certain product, whether egg or egg 7 products. It would be sent out to the Kroger 8 marketing areas, the KMAs, for their review. 9 And based on their lift, their turn, 10 their egg price, they would either decide to buy in 11 at that price that he's got out, or to change that 12 price to a price that they felt was more competitive 13 in their area. 14 Q. When you say buy in at the price, what 15 do you mean? 16 A. Basically agree to run the feature. 17 Q. So you're not talking about a buying-in 18 in terms of procurement of eggs? 19 A. No. 20 Q. You mean buy-in, as agreement? 21 A. Agree to run the feature. 22 Q. Right. So he may suggest, let's do a 23 feature of a dollar off a dozen eggs if you buy a 24 pound of Oscar Mayer bacon? 25 A. Yes.</p>

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<p style="text-align: center;">46</p> <p>1 Q. Would that be a type of feature he might 2 propose? A. Yes. 3 Q. Then each KMA has the right to decide 4 yes, I'd like it do that, or no, I don't want to do 5 that? A. Correct. 6 Q. And within a KMA, do individual stores 7 have an ability to opt in or out? A. No. 8 Q. What about within a KMA, could stores 9 within a particular city decide not to opt in? A. No. 10 Q. So once the KMA decides yes, we're going 11 to run that feature, a dollar off a dozen eggs if 12 you buy a pound of Oscar Mayer bacon, every store in 13 that region has to run that special? A. Yes. 14 Q. And is there any incentive given to 15 stores to buy in, as you say, to a feature? A. No. 16 Q. So if they agree to give that dollar off 17 the dozen eggs, that's a dollar out of their pocket? 18 MR. MURRAY: Object to the form of the 19 question. 20</p>	<p style="text-align: center;">48</p> <p>1 A. Yes. 2 Q. That dollar less is not compensated for 3 in any way by Kroger National? A. No. 4 Q. What did you learn from Mr. Payne? 5 A. Mr. Randy Payne is -- I worked with him 6 multiple years in the egg category until they 7 restructured and moved him into a planning position 8 for bakery. 9 And basically I asked him about the egg 10 products, what recollection he had on the retail egg 11 products. And he said he had very little to do with 12 that. 13 He would put the rollers, what they call 14 rollers in, which would feature a so much off per 15 unit of liquid eggs. 16 Other than that, he didn't have a whole 17 lot of dealing with it. 18 Q. Prior to 2007 or '8, which is when you 19 said Kroger formed this corporate brand group, did 20 Kroger run any sort of features for its own shell 21 eggs? A. Yes. 22 Q. And the features were similar to what we 23 talked about: If the regular price was 2.50 for a 24</p>
<p style="text-align: center;">47</p> <p>1 THE WITNESS: Yes. 2 MS. LEVIN: Did you get his answers? 3 THE COURT REPORTER: It was "yes," I 4 believe. 5 THE WITNESS: Yes. But most of the 6 features that they run isn't a dollar off. It's a 7 price point of 10 for 10; four for five. Three for 8 five. 9 BY MS. LEVIN: 10 Q. Tell me what you mean, 10 for 10. 11 A. 10 units for \$10. 10 dozen for \$10, or 12 a price point of four dozen for \$5, or three dozen 13 for \$5, based on what the market cost is. 14 Q. But it's some sort of discount off of 15 the store's regular price? 16 A. It's not a discount. It's a cost to the 17 consumer that's lower than their normal price that 18 they would charge at shelf. 19 Q. So if you regularly are paying 2.50 a 20 dozen for eggs in your store and there's a tentative 21 feature proposed to buy two dozen for \$4, that saves 22 a consumer a dollar; correct? 23 A. Yes. 24 Q. And it's a dollar less than that the 25 store gets for the two dozen eggs?</p>	<p style="text-align: center;">49</p> <p>1 dozen eggs, the feature price might be buy two dozen 2 for \$4? A. Correct. 3 Q. And were those features something which 4 each KMA had to decide whether to adopt or not? A. Yes. 5 Q. And again, if the KMA decided to adopt 6 it, all the stores within the KMA had to go along 7 with it? 8 A. Yes. 9 Q. How many KMAs are there? 10 A. 18. 11 Q. And has that been the case since 2000 or 12 so? 13 A. As far as my knowledge, yes. 14 Q. Not materially larger or smaller than 15 16 A. Correct. There has been some KMAs that 17 have combined -- we had a Michigan KMA that combined 18 with Columbus that just recently separated -- 19 Q. Uncombined? 20 A. Uncombined. Where we had the Nashville 21 KMA combined with mid south, and it has now been 22 split back off to two separate KMAs again. So we 23 might have 19 now.</p>

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<p style="text-align: center;">50</p> <p>1 Q. Right. So but -- 17/20, give or take -- 2 A. Yes. 3 Q. -- is the number of KMAs there have 4 been. 5 So the testimony you gave about what the 6 corporate brand group has done to promote Kroger 7 brand shell eggs by way of tentative features, is 8 applicable even prior to 2007 when the corporate 9 brand group was formed? 10 A. Yes. 11 Q. In terms of how it worked? 12 A. Yes. 13 The difference in when the corporate brand was formed versus before the corporate brand was performed, the KMA would decide what to do when they wanted to do it. 17 When the corporate brand team was formed, the corporate brands group would help organize the featuring of products so all the Kroger banners would hopefully be doing the same thing at the same time. 22 Q. Could a KMA decide to run a feature that 23 had not been proposed by the corporate brand group? 24 A. Yes. 25 Q. And do you know whether that happened </p>	<p style="text-align: center;">52</p> <p>1 Q. Do you know whether that varies by KMA? 2 A. Yes. 3 Q. Are there some KMAs that use eggs as a 4 loss leader more frequently than other KMAs? 5 A. Yes. 6 Q. Do you know which ones they are? 7 A. Michigan, Columbus/Michigan are very big promoters of eggs. 9 Q. And very big users of eggs as loss 10 leaders? 11 MR. MURRAY: Object to the form of the 12 question. 13 You can answer if you know. 14 THE WITNESS: I don't know. I don't see 15 that portion of it. 16 BY MS. LEVIN: 17 Q. Well, I thought you had identified them 18 as KMAs that were -- used shell eggs as loss leaders 19 more frequently than other KMAs. 20 A. They do. So your question is? 21 Q. Whether that's frequent or not. 22 A. Define "frequent." 23 Q. Well, do you have any use of the term 24 "frequent"? 25 Would they do it six times a year? </p>
<p style="text-align: center;">51</p> <p>1 with respect to shell eggs? 2 A. Yes. 3 Q. It did? 4 A. Absolutely. 5 Q. Post -- both pre and post the formation 6 of the corporate brand group? 7 A. Yes. KMAs are autonomous. They're responsible for their own P&Ls, and if they think an egg feature would draw more customers in a certain time, they would feature eggs to bring in a stronger customer base to increase sales. 12 Q. Are eggs ever used as a loss leader; do 13 you know? 14 A. Yes. 15 Q. What is a loss leader? 16 A. Loss leader is where they sell them at or below cost. It doesn't cover the full burden. 18 Q. And what is the purpose of selling eggs 19 at or below the cost as a loss leader? 20 A. To bring customers into your store, to hopefully buy additional merchandise to offset that cost. 23 Q. Do you have any sense of how often 24 Kroger may use shell eggs as a loss leader? 25 A. No. </p>	<p style="text-align: center;">53</p> <p>1 A. No. 2 Q. Four times a year? 3 A. No. 4 Q. Two times a year? 5 A. Maybe. 6 Q. And other KMAs use it -- eggs as a loss 7 leader less often than two times a year? 8 A. Yes. 9 Q. What else did you learn from Mr. Payne? 10 A. I think that's about it. 11 Q. What about Becky Bradley? What is her 12 position? 13 A. Becky Bradley is a global sourcing manager. 15 Q. What are her responsibilities? 16 A. Becky had egg products prior to me. 17 Retail egg products. 18 Q. So that would include Papetti's, 19 Fleischmann's and the Kroger brand? 20 A. Yes. 21 Q. And she was responsible for procuring 22 egg products? 23 A. Yes. 24 Q. What time period, do you know, did she 25 have that responsibility? </p>

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<p style="text-align: right;">54</p> <p>1 A. I know she's had for the last two years. 2 Q. So 2012 to 2014? 3 A. Yes. 4 Q. Do you know who had that position prior 5 to Ms. Bradley? 6 A. I don't have that knowledge. 7 Q. What did you learn from Ms. Bradley? 8 A. I asked Becky how often that they went 9 out for bid, how she managed the category since I 10 picked it up. I had a meeting with Becky and 11 Michael Foods to discuss their current business, how 12 they were sourcing their eggs, if they were UEP 13 certified. 14 Q. You say you had a meeting with 15 Ms. Bradley and Michael Foods? 16 A. Yes. 17 Q. Was that to prepare for your deposition? 18 A. No. 19 Q. But that's just a meeting -- 20 A. It was during -- sorry. 21 Q. Go ahead. 22 A. It was during the time that prior -- 23 right prior to the deposition, when we're getting 24 ready to rebid the -- put the liquid eggs out on 25 bid.</p>	<p style="text-align: right;">56</p> <p>1 A. No, I do not. 2 Q. Was there anybody at Kroger you could 3 speak to to learn that? 4 A. I don't know. 5 Q. Do you know who Ms. Bradley's 6 predecessor was for purposes of egg product 7 procurement? 8 A. No, we do not. 9 Q. Did Ms. Bradley tell you how she went 10 about obtaining a price from Michael Foods for egg 11 products? 12 A. Yes, she did. 13 Q. How was that? 14 A. They send it in to her. 15 Q. Does Ms. Bradley then negotiate with 16 Michael Foods over the price? 17 A. She had not. 18 Q. Did Ms. Bradley simply accept whatever 19 price Michael Foods submitted? 20 A. Yes. 21 Q. Are there alternative sources of supply 22 for egg products for retail sale? 23 A. Yes. 24 Q. Do you know who they are? 25 A. De Bel, Rose Acres are the two that come</p>
<p style="text-align: right;">55</p> <p>1 Q. And was Kroger requiring that Michael 2 Foods egg products be from hens that are treated in 3 accordance with the UEP -- 4 A. Yes. 5 Q. -- animal welfare guidelines? 6 A. Yes. 7 Q. I have that little tendency to pause at 8 confusing time periods. I'll try to cure that. 9 So how often are egg products let for 10 bid? 11 A. In Becky's recollection, she doesn't 12 ever remember, in her time, bidding the product. 13 Q. How do they obtain suppliers? 14 A. They're using the same supplier for 15 multiple years. 16 Q. And that's Michael Foods? 17 A. Yes. 18 Q. So has Michael Foods been the sole 19 supplier of egg products to Kroger for multiple 20 years? 21 A. The sole supplier for egg products for 22 retail, yes. 23 Q. Right, okay. And do you know how long 24 Michael Foods has been the sole supplier for egg 25 products for retail?</p>	<p style="text-align: right;">57</p> <p>1 to mind real quick. 2 Q. Did Ms. Bradley tell you why she didn't 3 seek bids from either of those two parties? 4 A. Yes. 5 Q. Why is that? 6 A. It was just a low-hanging priority on 7 her desk, and there was -- with the various 8 categories that she had, she just did not devote the 9 time to it. It's a small-volume item. 10 Q. Do know roughly what Krogers' sales of 11 egg products are in a given year? 12 A. Yeah, 6 million. 13 Q. Has that remained roughly constant for 14 the last several years? 15 A. Last several years, yes. 16 Q. What would the last several years be? 17 A. Five to 6 million. 18 Q. But, I mean, what -- would that go back 19 six years? Eight years? 20 A. Well, you go back as far as 2000, 21 started like a quarter million. And I think that's 22 when they introduced it. 23 Then it looked like it, it came up -- 24 climbed pretty steady until the last three or four 25 years, where it's pretty flat.</p>

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<p style="text-align: center;">58</p> <p>1 Q. And the last three or four years it's 2 been fairly flat at the 5 to \$6 million range?</p> <p>3 A. Yes.</p> <p>4 Q. Is that your acquisition cost or your 5 sales?</p> <p>6 A. That is cost.</p> <p>7 Q. So the acquisition cost began at roughly 8 \$250,000 in 2000, and has climbed to 6 million in 9 the last three or four years?</p> <p>10 A. Actually, 222,000, it's climbed to 11 around 6.9.</p> <p>12 Q. That's very precise.</p> <p>13 Do you know what the sales of egg 14 products are by Kroger for that time period?</p> <p>15 A. No.</p> <p>16 Q. Is there something you could look at to 17 determine that?</p> <p>18 A. Define what you mean by "sales."</p> <p>19 Q. Well, let's say the dollar sales of egg 20 products.</p> <p>21 A. I'm sure there's something in the system 22 if I looked that I could find the dollar sales, but 23 I have pretty well focused on cost.</p> <p>24 Q. Do you know what the margin is for egg 25 products?</p>	<p style="text-align: center;">60</p> <p>1 MR. MURRAY: Overly broad. 2 You can answer. You know what you know. 3 THE WITNESS: I don't know. I know they 4 look -- when they're analyzing a category, they look 5 at the category.</p> <p>6 Now, I know they drill down to item, and 7 when they look at the performance in store, it's 8 looked at by a category.</p> <p>9 BY MS. LEVIN:</p> <p>10 Q. And dairy category would be one 11 category?</p> <p>12 A. Yes.</p> <p>13 Q. And that would include milk?</p> <p>14 A. Yes.</p> <p>15 Q. Cheese?</p> <p>16 A. Yes.</p> <p>17 Q. Shell eggs?</p> <p>18 A. Yogurt.</p> <p>19 Q. And potatoes?</p> <p>20 A. Yes.</p> <p>21 Q. Anything else that's included in the 22 dairy category?</p> <p>23 MR. MURRAY: Objection; outside the 24 scope.</p> <p>25 You can answer if you know.</p>
<p style="text-align: center;">59</p> <p>1 A. No, I do not. They really don't look at 2 a margin per -- or for an item. They look at the 3 margin for a category.</p> <p>4 Q. And the category here would be dairy 5 case?</p> <p>6 A. It would be dairy. It would be 064, 7 muffins, potatoes and eggs.</p> <p>8 Q. Muffins, potatoes and eggs?</p> <p>9 A. Uh-huh.</p> <p>10 Q. Potatoes are in the dairy category?</p> <p>11 A. Yes.</p> <p>12 Q. What kind of potatoes?</p> <p>13 A. I'm making you hungry.</p> <p>14 Q. That's okay.</p> <p>15 A. Hash browns and the -- I guess what you 16 would fry with your breakfast, the different types 17 of hash browns.</p> <p>18 Q. But not red-skin potatoes?</p> <p>19 A. No, not whole potatoes.</p> <p>20 Q. Okay, got it. So Kroger doesn't 21 determine profitability by product line; only by 22 this category?</p> <p>23 MR. MURRAY: Objection to the form of the question.</p> <p>24 MS. LEVIN: Is that correct?</p>	<p style="text-align: center;">61</p> <p>1 BY MS. LEVIN:</p> <p>2 Q. You don't know?</p> <p>3 A. I don't know.</p> <p>4 Let me clarify. In the 064 category 5 that they look, milk and cheese and yogurt are not 6 in there. It's part of the dairy category, but they 7 have subcategories in the dairy section. I didn't 8 want to mislead you.</p> <p>9 Q. But that's as much as you know; you 10 don't know about the profitability or margins --</p> <p>11 A. No.</p> <p>12 Q. -- no matter how we define the category?</p> <p>13 A. Correct.</p> <p>14 Q. What about Lisa Beth Miller; what does 15 Ms. Miller do?</p> <p>16 A. Lisa Beth Miller, from my understanding, 17 was Gary Stull's direct report to be several years.</p> <p>18 Q. So what were her job responsibilities?</p> <p>19 A. I do not know.</p> <p>20 Q. What did you learn from Ms. Miller?</p> <p>21 A. We talked about the liquid egg category, 22 about Gary Stull's responsibilities to her; how much 23 responsibility she had over decisions that were 24 made.</p> <p>25 Q. And what did Ms. Miller tell you about</p>

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<p style="text-align: center;">62</p> <p>1 those two subjects?</p> <p>2 A. That she remembered putting the liquid 3 eggs out on bid. She did say Gary Stull did report 4 to her, but Gary pretty well handled the entire 5 category and would only communicate to her on 6 higher-level stuffs but not on the day-to-day 7 operation of the category.</p> <p>8 Q. So Ms. Miller advised you that during 9 the time period that Mr. Stull was in charge of egg 10 procurement, which was roughly 2000 to 2006 I think 11 you testified, that liquid eggs were bid?</p> <p>12 A. Yes.</p> <p>13 Q. So prior to the time when Ms. Bradley 14 took over, there was competitive bidding for liquid 15 eggs?</p> <p>16 A. Yes. But Gary Stull did not take care 17 of liquid eggs.</p> <p>18 Q. I understand. But Ms. Miller apparently 19 had some knowledge on that subject?</p> <p>20 A. Yes.</p> <p>21 Q. And she conveyed it to you that liquid 22 eggs were put out on bid for at least some period of 23 time.</p> <p>24 Did she tell you how that was 25 accomplished?</p>	<p style="text-align: center;">64</p> <p>1 the UEP logo was put on the carton.</p> <p>2 Q. And does the UEP logo appear on cartons 3 of eggs sold under the Kroger brand?</p> <p>4 A. It did.</p> <p>5 Q. When did it appear on those cartons?</p> <p>6 A. Well, I read it in a memo. Is that -- 7 is that -- I don't know when it exactly appeared. 8 That's what I was trying to find out, what with the 9 questions to Jenny Betz, if she had a history file 10 that she could go back and look at revisions on 11 artwork and tell me when it was introduced, as well 12 as Phil Laughlin at Dolco.</p> <p>13 Q. What did you learn?</p> <p>14 A. That they did not know when it was 15 introduced on the carton.</p> <p>16 Q. Do you know when -- was it taken off at 17 some point?</p> <p>18 A. Yes.</p> <p>19 Q. When was it taken off?</p> <p>20 A. About a year, year and a half ago.</p> <p>21 Q. Do you know why?</p> <p>22 A. Because they did a consumer panel on it, 23 and none of the consumers recognized the logo and 24 knew what the relevance of the logo was.</p> <p>25 So they decided at that time that it</p>
<p style="text-align: center;">63</p> <p>1 A. I don't remember.</p> <p>2 Q. Do you know whether RFPs were issued?</p> <p>3 A. I don't know.</p> <p>4 Q. Do you know whether someone besides 5 Michael Foods ever won those bids?</p> <p>6 A. No.</p> <p>7 Q. What else did you learn from Ms. Miller?</p> <p>8 A. That was about it.</p> <p>9 Q. Ms. Miller didn't have any actual 10 responsibility or any day-to-day responsibility for 11 shell egg procurement?</p> <p>12 A. She was responsible for, but she said 13 Gary Stull pretty well handled the whole thing.</p> <p>14 Q. What about Lisa Betz?</p> <p>15 A. Jenny Betz?</p> <p>16 Q. Jim? Okay.</p> <p>17 Yes. What's Ms. Betz' responsibility?</p> <p>18 A. Jenny Betz works in Kim Bower's group as 19 far as analyzing the artwork. She proofs the 20 artwork and approves the artwork with the Kroger 21 system before we send it out to suppliers.</p> <p>22 Q. What kind of artwork?</p> <p>23 A. The artwork on the egg cartons.</p> <p>24 Q. What did you learn from Ms. Betz?</p> <p>25 A. The question I asked Jenny Betz was when</p>	<p style="text-align: center;">65</p> <p>1 wasn't an end value to the consumer, so therefore we 2 should remove it.</p> <p>3 Q. Did the UEP logo also appear on the 4 various banner brand products besides those that 5 were sold under the Kroger banner?</p> <p>6 A. As far as I know, yes.</p> <p>7 Q. And was it also removed from those 8 cartons about a year ago?</p> <p>9 A. As the artwork is being revised, it's 10 being removed.</p> <p>11 Q. Does Kroger manufacture the carton, the 12 packaging for --</p> <p>13 A. No. No.</p> <p>14 Q. Does Kroger supply the packaging to 15 shell egg producers?</p> <p>16 A. No.</p> <p>17 Q. Was there a point in time when did it 18 did?</p> <p>19 A. No.</p> <p>20 Q. Did your survey include, do you know, 21 whether consumers value eggs that have been laid by 22 eggs that have been treated humanely?</p> <p>23 MR. MURRAY: Object to the form of the 24 question.</p> <p>25 THE WITNESS: I do not know.</p>

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<p style="text-align: right;">66</p> <p>1 BY MS. LEVIN:</p> <p>2 Q. You don't know if that was a part of the</p> <p>3 survey?</p> <p>4 A. Yes. I had no part in the survey.</p> <p>5 Q. All you know from Ms. Betz is that the</p> <p>6 survey suggested that consumers didn't recognize the</p> <p>7 logo, didn't know what it meant?</p> <p>8 A. Correct.</p> <p>9 Q. What about Phil Pugh?</p> <p>10 MR. MURRAY: Phil Pugh is a member -- is</p> <p>11 part of Kroger legal. Any discussions you had with</p> <p>12 him or with me are covered by the attorney-client</p> <p>13 privilege, so don't reveal any information that</p> <p>14 you've learned in those discussions.</p> <p>15 BY MS. LEVIN:</p> <p>16 Q. So you've spent some time with a member</p> <p>17 of the Kroger law department?</p> <p>18 A. Yes.</p> <p>19 Q. Can you tell me what topics you covered</p> <p>20 with Mr. Pugh? Not the substance but just what the</p> <p>21 subject matter was.</p> <p>22 MR. MURRAY: Just in very, very general</p> <p>23 terms.</p> <p>24 THE WITNESS: Egg deposition</p> <p>25 proceedings.</p>	<p style="text-align: right;">68</p> <p>1 MS. LEVIN: Yeah, I think it might be as</p> <p>2 good a time as any to take a break.</p> <p>3 THE VIDEOGRAPHER: We are going off the</p> <p>4 record. Time on video is 10:33. This is the end of</p> <p>5 disk 1.</p> <p>6 (Recess taken.)</p> <p>7 THE VIDEOGRAPHER: We are going back on</p> <p>8 the record. Time on video is 10:50. This is the</p> <p>9 beginning of disk 2.</p> <p>10 BY MS. LEVIN:</p> <p>11 Q. Mr. Klump, I'm going to switch gears</p> <p>12 just a little bit now, and I'm going to touch on a</p> <p>13 couple of topics that I think won't take too</p> <p>14 terribly long, just so we can say they're done.</p> <p>15 And the first one is Krogers' use of egg</p> <p>16 products in products that Kroger manufactures.</p> <p>17 Okay?</p> <p>18 A. Okay.</p> <p>19 Q. And you've told me Kroger doesn't use</p> <p>20 any shell eggs in its manufacturing operations;</p> <p>21 correct?</p> <p>22 A. Correct.</p> <p>23 Q. What products does Kroger use egg</p> <p>24 products in?</p> <p>25 A. Primarily in three different areas. We</p>
<p style="text-align: right;">67</p> <p>1 BY MS. LEVIN:</p> <p>2 Q. Did Mr. Pugh tell you how others had</p> <p>3 testified?</p> <p>4 A. No.</p> <p>5 Q. But you just talked more generally about</p> <p>6 what a deposition was all about?</p> <p>7 A. Metrics behind it, yes.</p> <p>8 Q. What about Mr. Laughlin?</p> <p>9 A. Phil Laughlin is a VP at Dolco; and he</p> <p>10 is --</p> <p>11 Q. Excuse me. VP of what?</p> <p>12 A. Dolco, D-O-L-C-O, which is our foam</p> <p>13 carton manufacturer.</p> <p>14 I talked to Phil about the introduction</p> <p>15 of the UEP logo into the carton, when it was put on,</p> <p>16 if he had any artwork files that would identify</p> <p>17 when. I had several conversations with him. He</p> <p>18 called me back with some dates, and I knew they</p> <p>19 weren't right; told him to keep looking.</p> <p>20 He finally called me back and said,</p> <p>21 apparently they purged the data for what -- he had</p> <p>22 no history that could reveal that.</p> <p>23 Q. Okay.</p> <p>24 MR. MURRAY: Are you switching gears</p> <p>25 now?</p>	<p style="text-align: right;">69</p> <p>1 use them in the production of salad dressing and</p> <p>2 liquid dressings, would be the -- at the State</p> <p>3 Avenue facility.</p> <p>4 We use them in the different, various</p> <p>5 bakeries in the baking of cakes. I'm not really</p> <p>6 sure what -- angel food cakes and regular sheet</p> <p>7 cakes and baked goods.</p> <p>8 And the third application that I'm aware</p> <p>9 of is in ice cream.</p> <p>10 Q. So as far as you know, it's just those</p> <p>11 three general product categories that Kroger uses</p> <p>12 egg products in the manufacturing process?</p> <p>13 A. Let me add one other. We also use them</p> <p>14 in our KB specialty facility in the production of</p> <p>15 salads, hard-boiled eggs. But it's -- I don't know</p> <p>16 if you would term that an egg product.</p> <p>17 Q. Okay. But what is KB specialty?</p> <p>18 A. KB specialty is a Kroger manufacturing</p> <p>19 division that produces potato salad, your coleslaws,</p> <p>20 your different dressing type; deli-type operation</p> <p>21 that also does salads.</p> <p>22 Q. And KB specialty uses hard-boiled eggs</p> <p>23 exclusively?</p> <p>24 A. Hard-boiled eggs, yes. And they do use</p> <p>25 some liquid eggs as well.</p>

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<p style="text-align: center;">70</p> <p>1 Q. Okay. Are the egg products that are 2 used in these four applications all supplied by 3 Michael Foods today?</p> <p>4 A. No.</p> <p>5 Q. By whom are they supplied?</p> <p>6 A. All right. State Avenue is supplied by Brown Produce.</p> <p>7 Q. Brown Produce?</p> <p>8 A. Brown, B-R-O-W-N. Country Oven -- let me back up a minute.</p> <p>9 The Brown Produce supplies all the 10 liquid eggs. We do use some dried eggs from 11 Michael's as well.</p> <p>12 Pretty much through our operation 13 Michael supplies most of all our dried egg products 14 that we use in our operation, but what I'm going to 15 give you now is all the liquids.</p> <p>16 Country Oven, which is in Bowling Green, 17 Kentucky. Rose Acres is the primary supplier of our 18 liquid whites and our whole egg.</p> <p>19 Springdale Bakery or Springdale 20 Ice Cream Plant; Rose Acres supplies liquid yolks.</p> <p>21 Moving west going to Layton, Layton Bakery is 22 supplied by Shepherd Brothers. Clackamas Bakery is 23 supplied by Willamette.</p>	<p style="text-align: center;">72</p> <p>1 I transitioned, due to cost, to Rose Acres from -- away from Brown Produce.</p> <p>2 Q. Did I understand that Michael Foods in 3 the past was a primary supplier of the liquid egg 4 products, but then you decided to move to more local 5 suppliers?</p> <p>6 A. Michael Foods was the primary supplier in the way they were able to achieve that they had 30-pound frozen product.</p> <p>7 Q. Right.</p> <p>8 A. We moved away from the frozen product to the more liquid products for ease of handling and more sustainable. And that's why I moved away from Michael.</p> <p>9 Q. And the "more sustainable" refers to 10 using more local suppliers?</p> <p>11 A. Local suppliers and more reusable containers. We're using 2,000-pound reusable totes and not throwing away 70, 80 buckets of plastic buckets, which have to be handled, washed, cleaned, before we can even dispose of them. And then you have the disposal cost.</p> <p>12 Q. Right. So in addition to the actual 13 price of egg products, an important issue for you 14 with respect to selection of supplier is the type of</p>
<p style="text-align: center;">71</p> <p>1 I'm probably missing some of the 2 dairies, maybe Jackson Ice Cream, which is closed 3 now. I think that's about it.</p> <p>4 Q. So that's your suppliers of dried and 5 various forms of liquid eggs today?</p> <p>6 A. Yes.</p> <p>7 Q. Has that -- those same suppliers 8 supplied Kroger in the past with respect to liquid 9 egg products?</p> <p>10 A. Yes and no. Taking Michael Foods out of 11 a lot of areas and introducing more local supplier. 12 My primary reason is Michael produces frozen, frozen 13 yolks, which, if you use a fresh product, it has 14 better emulsification principles. There's less 15 handling. It's more sustainable.</p> <p>16 So I'm moving like Springdale Dairy, I 17 moved them from a pail -- 30-pound frozen pails to 18 2,000-pound totes, liquid totes, where they didn't 19 have to open the buckets, wash the buckets, dispose 20 of the buckets to a tote, returnable tote system.</p> <p>21 And done that with Shepherd Brothers as 22 well.</p> <p>23 Rose Acres was not the supplier to 24 Country Oven, Brown Produce was. About two or three 25 years ago when I picked up the liquid egg business,</p>	<p style="text-align: center;">73</p> <p>1 delivery system that a particular producer is using?</p> <p>2 A. Yes. It's got to work in manufacturing.</p> <p>3 Q. Right. And when you switch suppliers, I 4 would imagine, particularly if you're switching from 5 a frozen product to a liquid product, you'd have to 6 qualify a supplier?</p> <p>7 A. Yes.</p> <p>8 Q. And rewrite your recipes, for instance?</p> <p>9 A. Not as much rewrite the recipe, but it 10 needs to have a new resource number if it's a 11 different -- because every resource number that are 12 tagged to a product has a characteristic storage 13 conditions, shelf life that needs to be rewritten to 14 the current product to make sure it's applicable.</p> <p>15 Q. Do you know roughly when you made the 16 decision to move from Michael Foods as a primary 17 supplier to these other suppliers of egg products?</p> <p>18 A. Probably in the last four years.</p> <p>19 Q. So maybe around 2010?</p> <p>20 A. Yes.</p> <p>21 Q. Are Brown Produce, Country Oven, Rose 22 Acres Food, Shepherd Brothers, Willamette, are these 23 all suppliers whose eggs are produced in accordance 24 with the UEP animal welfare guidelines?</p> <p>25 A. Yes.</p>

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<p style="text-align: center;">74</p> <p>1 Q. And you require all suppliers of egg 2 products to produce eggs in accordance with those 3 guidelines?</p> <p>4 A. Yes.</p> <p>5 Q. And has that been true since 2002?</p> <p>6 A. No.</p> <p>7 Q. When did that change?</p> <p>8 A. It came it surfaced when Jennifer Siewe 9 had the category that some of our egg suppliers, 10 some of our liquid egg suppliers were not adhering 11 to the UEP standard.</p> <p>12 Q. Do you know roughly when that was?</p> <p>13 A. Not exactly, no.</p> <p>14 Q. Do you have a general idea?</p> <p>15 A. I would say it was probably in the 16 2007/2008 range.</p> <p>17 Q. Prior to that discovery, had it been a 18 requirement of Kroger that suppliers of liquid eggs 19 provide you with products that have been produced in 20 accordance with the UEP guidelines?</p> <p>21 A. Not to my knowledge.</p> <p>22 Q. So this discovery at that time period 23 was not a discovery that someone wasn't complying 24 with a Kroger requirement; it was something else?</p> <p>25 A. Yes.</p>	<p style="text-align: center;">76</p> <p>1 providing you with product that had been produced in 2 accordance with the UEP guidelines?</p> <p>3 A. Yes.</p> <p>4 Q. Who was that?</p> <p>5 A. Brown Produce was. Rose Acres was.</p> <p>6 Q. Had Michael Foods been providing product 7 that was produced in accordance with the UEP 8 guidelines?</p> <p>9 A. I don't know.</p> <p>10 Q. Do you know whether any others were 11 providing you with product that had been produced in 12 accordance with the UEP guidelines?</p> <p>13 A. I wasn't that close to it; no.</p> <p>14 Q. But you are sure that Brown and Rose 15 Acre Foods --</p> <p>16 A. Rose Acre Farms.</p> <p>17 Q. Rose Acre Farms, I'm sorry -- were 18 providing you with egg product produced in 19 accordance with the guidelines?</p> <p>20 A. Yes.</p> <p>21 Q. Do you know how it was communicated to 22 the other suppliers that they needed to provide 23 you -- to provide Kroger with egg product that was 24 produced in accordance with the guidelines?</p> <p>25 A. I do not.</p>
<p style="text-align: center;">75</p> <p>1 Q. Do you know who learned that not all the 2 liquid egg suppliers were adhering to the UEP 3 guidelines?</p> <p>4 A. Exactly, no.</p> <p>5 Q. Do you know how that was brought to 6 Krogers' attention at all?</p> <p>7 A. It was brought to Krogers' attention 8 through some media. The Ben & Jerry deal with Pete 9 and HSUS going after Ben & Jerry for sourcing eggs 10 from a supplier that did not treat their product -- 11 did not care to -- or weren't concerned about the 12 sourcing of their products that went into the 13 manufacturing of their product.</p> <p>14 Q. And did the Ben & Jerry news story cause 15 Kroger then to examine its own practices?</p> <p>16 A. Yes.</p> <p>17 Q. And that's how you learned that some of 18 the suppliers were not providing you with product 19 that had been produced in accordance with the UEP 20 guidelines?</p> <p>21 A. Yes.</p> <p>22 Q. What did Kroger do at that point?</p> <p>23 A. Required all liquid egg products to be 24 produced in accordance with UEP standards.</p> <p>25 Q. Were there some suppliers that were</p>	<p style="text-align: center;">77</p> <p>1 Q. Do you know whether there was any 2 reaction by those who received this notice?</p> <p>3 A. No, I do not.</p> <p>4 Q. Do you know whether there was any 5 pushback by any other suppliers when they were told 6 that they had to provide product that had been 7 produced in accordance with the UEP guidelines?</p> <p>8 A. No, I do not.</p> <p>9 Q. Do you know whether the other suppliers 10 then began to provide product that was produced in 11 accordance with the UEP guidelines?</p> <p>12 A. It was mandated that they would supply 13 product that was UEP certified.</p> <p>14 Q. And my question is whether they met that 15 mandate or whether they chose not to supply product 16 to Kroger anymore.</p> <p>17 A. There was some supplier switches at that 18 time.</p> <p>19 Q. Do you know which suppliers were 20 dropped?</p> <p>21 A. No, I do not.</p> <p>22 Q. Is there anyone that would be able to 23 provide that information?</p> <p>24 A. Not that I know of.</p> <p>25 Q. Did you talk with Ms. Siewe about it?</p>

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<p style="text-align: center;">78</p> <p>1 A. No, I did not.</p> <p>2 Q. So you don't know if she could answer 3 that question or not?</p> <p>4 A. No, I do not.</p> <p>5 Q. Has Kroger ever been a member of a 6 cooperative or any other type of group purchasing 7 association?</p> <p>8 A. Not that I know of.</p> <p>9 Q. With respect to -- not just with respect 10 to eggs and shell eggs and egg products but with 11 respect to any other kind of product that Kroger 12 sells?</p> <p>13 A. Your question is whether they've ever 14 been a member of the cooperative?</p> <p>15 Q. Right.</p> <p>16 A. Not that I know of.</p> <p>17 Q. Have they ever engaged in any sort of 18 group buying with other retailers, for example?</p> <p>19 A. Not that I'm aware of.</p> <p>20 Q. Has Kroger ever engaged in any sort of 21 group buying with any other kind of purchaser?</p> <p>22 A. Not that I'm aware of.</p> <p>23 Q. So far as you know, Kroger does all of 24 its purchasing directly from its suppliers?</p> <p>25 A. Directly from its suppliers or through a</p>	<p style="text-align: center;">80</p> <p>1 639. 2 (Kroger Exhibit 42 was marked for 3 identification.) 4 THE WITNESS: I recognize this. 5 BY MS. LEVIN: 6 Q. Have you had a chance to review 7 Exhibit 42, Mr. Klump?</p> <p>8 A. I wrote it. 9 Q. It looks familiar? 10 A. Yes, ma'am. 11 Q. Is it a document you reviewed to prepare 12 for your testimony today? 13 A. Yes, it is. 14 Q. Very good. 15 Could you just state for the record what 16 Exhibit 42 is. 17 A. It's a presentation of mine about the 18 retail egg buying. 19 Q. And it's dated May 11, 2010? 20 A. May 14th, 2010. 21 Q. But the presentation appears to have 22 been on May 11, 2010? 23 A. Oh. Yes. 24 Q. Do you recall the circumstances under 25 which you prepared Exhibit 42?</p>
<p style="text-align: center;">79</p> <p>1 broker. 2 Q. What sort of broker -- well, start by, 3 does Kroger use any brokers for shell eggs or egg 4 products? 5 A. Shell eggs, no. Shell egg products, 6 yes. 7 Q. What brokers does Kroger use for the 8 purchase of egg products? 9 A. There is a brokerage firm that 10 represents Michael's; and I do not know the name of 11 it. And the only reason I'm aware of it is that we 12 had the meeting with Michael's and they came in. 13 Q. That was a recent meeting? 14 A. About a year and a half ago. 15 Q. Was that the first you've ever learned 16 of a broker for the purchase of egg products? 17 A. Yes. 18 Q. My questions, I think, may have been in 19 the present tense. 20 Are you aware of whether Kroger has ever 21 engaged in any type of group buying with respect to 22 shell eggs? 23 A. They have not, no. 24 MS. LEVIN: Let's mark as Exhibit 42 a 25 document bearing Bates No. KRGEGED00013608 through</p>	<p style="text-align: center;">81</p> <p>1 A. Yes. 2 Q. What were they? 3 A. To explain the egg category. 4 Q. To whom? 5 A. To category managers, other personnel at 6 Krogers, exactly what our egg initiative was. 7 Q. Can you describe what a category manager 8 is. 9 A. Ross Kramers. Other people that are 10 associated with the egg category but do not have a 11 direct influence -- they -- they're further 12 downstream from the procurement of eggs. Explained 13 to them the process of egg purchasing. 14 Q. How many -- well, what is the category 15 that we're talking about here for eggs? 16 A. Eggs, muffins and potatoes; 064. 17 Q. And the 064 category includes shell eggs 18 but not egg products; is that correct? 19 A. It includes egg products. 20 Q. So both shell eggs -- 21 A. Shell eggs and egg products. 22 Q. How many category managers does Kroger 23 have? 24 A. I do not know. 25 Q. How many people were present for this</p>

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<p style="text-align: right;">82</p> <p>1 meeting?</p> <p>2 A. I have given -- this exact meeting, I'm</p> <p>3 not sure. I'm sure there was probably four to six</p> <p>4 people.</p> <p>5 Q. Did you do this presentation multiple</p> <p>6 times?</p> <p>7 A. Yes.</p> <p>8 Q. How many times did you do it?</p> <p>9 A. Three that I can recall.</p> <p>10 Q. And were there roughly four to six</p> <p>11 people present at each meeting?</p> <p>12 A. I would say three to -- three to six,</p> <p>13 yes.</p> <p>14 Q. Did that reach all of the category</p> <p>15 managers for the 064 category at Kroger?</p> <p>16 A. Yes.</p> <p>17 Q. Are the category managers by division?</p> <p>18 A. No.</p> <p>19 Q. What sort of organization is there to</p> <p>20 the category managers?</p> <p>21 A. Category managers are corporate. And</p> <p>22 basically it is a change category managers. I would</p> <p>23 regive the presentation to help them understand</p> <p>24 their category, or this piece of their category so</p> <p>25 they would have a base understanding of what our</p>	<p style="text-align: right;">84</p> <p>1 between corporate and the KMA. And the category</p> <p>2 manager may -- will handle all KMAs where a</p> <p>3 merchandiser handles that specific portion of maybe</p> <p>4 a category at the KMA.</p> <p>5 Q. At any single moment in time, is there a</p> <p>6 category manager that is the liaison between</p> <p>7 corporate and more than one KMA?</p> <p>8 A. Yes.</p> <p>9 Q. How many KMAs would a category manager</p> <p>10 be the liaison for?</p> <p>11 A. All the KMAs.</p> <p>12 Q. Let me try this again. How many</p> <p>13 category managers are there at a single moment for</p> <p>14 the 064 category?</p> <p>15 A. One.</p> <p>16 Q. So this presentation was made to -- who</p> <p>17 was the presentation made to?</p> <p>18 A. Well --</p> <p>19 Q. Beyond category managers.</p> <p>20 A. Let me try to explain this to you,</p> <p>21 because I think you're getting confused.</p> <p>22 Q. That would be helpful.</p> <p>23 A. There's corporate brands, remember we</p> <p>24 had the corporate brands group.</p> <p>25 Q. Right.</p>
<p style="text-align: right;">83</p> <p>1 procurement buying practices were.</p> <p>2 Q. And why was it important for the</p> <p>3 category managers to understand your procurement</p> <p>4 practices?</p> <p>5 A. Because they're solely responsible for</p> <p>6 the category.</p> <p>7 Q. They're responsible in what respect?</p> <p>8 A. From a planning and sales perspective.</p> <p>9 Q. And from a profitability perspective?</p> <p>10 A. Yes.</p> <p>11 Q. Are the category managers the ones that</p> <p>12 decide by KMA whether to run a feature?</p> <p>13 A. No.</p> <p>14 Q. That's decided at a KMA level?</p> <p>15 A. It's at the KMA.</p> <p>16 Q. Is there a category manager for each</p> <p>17 KMA?</p> <p>18 A. No. There's a merchandiser.</p> <p>19 Q. Okay. And what does the merchandiser</p> <p>20 do?</p> <p>21 A. He decides whether to run the features</p> <p>22 or not.</p> <p>23 Q. And what does the category manager</p> <p>24 actually do?</p> <p>25 A. The category manager is a conduit</p>	<p style="text-align: right;">85</p> <p>1 A. In corporate brands, they have planning,</p> <p>2 sourcing, and CSI. CSI is new product introduction.</p> <p>3 CSI is -- their function is to think five, 10 years</p> <p>4 out, okay?</p> <p>5 Q. Okay.</p> <p>6 A. Then they report up to a national -- or</p> <p>7 a category manager for dairy. He's in charge of</p> <p>8 national and banner, okay?</p> <p>9 Q. So there's a single category manager for</p> <p>10 064, the 064 category?</p> <p>11 A. There's -- yes.</p> <p>12 Q. And he's in charge of both national</p> <p>13 brands and banner brands?</p> <p>14 A. Yes.</p> <p>15 Q. So in this case there will be a single</p> <p>16 category manager for eggs, muffins and potatoes, the</p> <p>17 064 category; and he would be in charge of both the</p> <p>18 Kroger and banner brands of shell eggs, the national</p> <p>19 brands of shell eggs, and both the national and</p> <p>20 Kroger brands for egg products?</p> <p>21 A. Right. But then we have a category</p> <p>22 manager that does nothing but promote banner brands.</p> <p>23 Q. Right.</p> <p>24 So does that -- those two category</p> <p>25 managers work hand in hand?</p>

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<p style="text-align: right;">86</p> <p>A. Yes. The category manager of banner reports up to the category manager of national.</p> <p>Q. So if there were four to six people at the presentation on May 11th, who was there besides the category managers?</p> <p>A. It would be corporate brands' category manager; they had a certain person that done all the sales planning, the CSI; and then the national category manager, and it may have been their boss as well.</p> <p>Q. Okay. And you said you did this presentation maybe three or four times?</p> <p>A. Yes.</p> <p>Q. Who was present for those other presentations?</p> <p>A. As the category managers changed, which they change roles quite a bit, it would be the new group.</p> <p>Q. So you have done the same presentation over time for people in the same job positions that you've described as those job -- the person holding those jobs have changed?</p> <p>A. Yes.</p> <p>Q. When did you do this presentation that's found in Exhibit 42 for the first time; do you know?</p>	<p style="text-align: right;">88</p> <p>types that Kroger bought in 2010?</p> <p>A. No.</p> <p>Q. What other shell egg types did Kroger buy in 2010?</p> <p>A. Well, the shell egg types are somewhat specific to the KMA. There are generalities; but a certain -- take the California KMAs have 20 counts. 20-count overwraps, where none of the eastern KMAs have them.</p> <p>We have a 60-dozen unit -- 60 dozen -- 60-count unit that it's not listed here.</p> <p>So to answer your question, yes, there are other ones. They're not listed.</p> <p>Q. You've mentioned other, what I would describe as types of packaging in terms of the quantity of the eggs that are in the resale package.</p> <p>But in terms of sizes of eggs, does the list on Page 5 of Exhibit 42 capture them all?</p> <p>A. Size, you're talking about the egg actual, small, medium, large, extra-large, jumbo?</p> <p>Q. There's a list in the middle of this chart that says "Size." And my question is really just whether that's all of the sizes that Kroger purchased in 2010.</p> <p>A. I guess where I'm not clear is that we</p>
<p style="text-align: right;">87</p> <p>A. It looks like this one was done May 11, 2010.</p> <p>Q. Right. Do you think that was the first time you did it?</p> <p>Maybe there's some way you can tell by looking at it, I don't know.</p> <p>A. Yes, it appears to be one of the first.</p> <p>Q. And how recently did you do the presentation that's found in Exhibit 42?</p> <p>A. It's probably been a year or so since I've done this presentation; because this isn't -- this presentation is outdated.</p> <p>MR. NOVAK: Excuse me a moment. Paul Novak. Could you reread the Bates number of the first page of Exhibit 42 again. I think I wrote it down incorrectly.</p> <p>MS. LEVIN: It's KRGEGED00013608.</p> <p>MR. NOVAK: Thank you.</p> <p>MS. LEVIN: Through 39.</p> <p>BY MS. LEVIN:</p> <p>Q. Could you turn to Page 5 of Exhibit 42. It's titled, "What We Buy."</p> <p>And on the right-hand side of the page there's a list of egg sizes.</p> <p>Is that a complete list of the shell egg</p>	<p style="text-align: right;">89</p> <p>have -- an extra-large 18 count, are you saying that's a -- there is extra-large on here but not an extra-large 18 count. Are you saying that's a different size, or would you class --</p> <p>Q. Well, I'm trying to set to one side the packaging size because you've mentioned that California has cartons that contain 20 eggs. Is that what you meant by 20 count?</p> <p>A. Yes, ma'am.</p> <p>Q. And that somewhere you sell 60-count units, which would be five dozen cartons?</p> <p>A. Yes.</p> <p>Q. I'm not so concerned about the size -- the number of the eggs in the carton. I want to know whether this is a complete list of the egg size, regardless of packaging, that Kroger sells.</p> <p>A. So your answer would be yes.</p> <p>Q. And do you know whether this is a correct list of the size of eggs that Kroger has bought for the last -- since 2000?</p> <p>A. The only exception on here would be a small, and I know small has dropped. But I don't know when it was.</p> <p>Q. So it's possible that sometime since 2000, Kroger has also purchased small eggs?</p>

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<p style="text-align: right;">90</p> <p>1 A. Yes. 2 Q. What is Private Selection? 3 A. Private Selection is a brand. 4 Q. The name literally is Private Selection? 5 A. Yes. 6 Q. From whom do you purchase Private 7 Selection eggs? 8 A. Which ones? 9 Q. I don't know. You tell me what they 10 are. 11 A. Private Selection was our specialty 12 line. We had a Private Selection organic, a 13 cage-free brown, and an omega-3 brown. And -- well, 14 we have a Christopher egg, which is proprietary with 15 Rose Acres. 16 Q. A Christopher egg? 17 A. Uh-huh. 660 milligrams of omega-3 at a 18 one-to-one ratio. 19 Q. And those eggs are all sold under a 20 Kroger banner? 21 A. Yes. 22 Q. And the Kroger banner says "Private 23 Selection"?: 24 A. Yes. 25 Q. Some of those Private Selection eggs</p>	<p style="text-align: right;">92</p> <p>1 A. Yes. 2 Q. When you say cost of production is what 3 drives the pricing of Private Selection, does Kroger 4 procure Private Selection eggs on cost-plus 5 contracts? 6 A. No. It's on a flat cost. 7 Q. Okay. Can you describe how that works. 8 A. I guess in -- in -- it isn't -- where -- 9 the difference in a cost-plus and a flat -- a flat 10 price system is cost plus you go procure your beans 11 and your corn. That sets your base on your fee 12 component. 13 You look at your variable and your fixed 14 cost with profit, and that formulates into the cost 15 of an egg. 16 With the specialty eggs being that you 17 don't sell multiple sizes, you basically sell large, 18 there isn't a medium Private Selection egg. There 19 isn't an extra-large or a jumbo. So your grade loss 20 is much higher. 21 Therefore, when they formulate the cost, 22 they take that into account, because the cost of 23 production is much higher. It comes up with 24 basically a cost of goods that they formulate as the 25 cost they need to -- to be consistent or whole with</p>
<p style="text-align: right;">91</p> <p>1 would be each of these types of eggs you've listed? 2 A. Yes. 3 Q. Do you know whether Krogers' seeking 4 damages in this litigation for Private Selection 5 eggs? 6 MR. MURRAY: Objection to the form of 7 the question, calls for a legal conclusion. 8 You can answer if you know. 9 THE WITNESS: Private Selection is a 10 specialty egg that's flat priced. 11 BY MS. LEVIN: 12 Q. That's -- excuse me? 13 A. Is a specialty egg that's flat priced. 14 Q. I didn't understand. The what priced? 15 A. Flat. 16 Q. Flat priced. What do you mean by flat 17 priced? 18 A. It's not market driven. 19 Q. What drives flat pricing? 20 A. Cost of production. 21 Q. Was Mr. Stull, and then you, in charge 22 of procurement for Private Selection eggs? 23 A. Yes. 24 Q. So both of you had that in your 25 portfolio?</p>	<p style="text-align: right;">93</p> <p>1 this product; and that's the price they offer. 2 And we look at that price pretty much 3 once a year to update it with the current market 4 conditions. 5 Q. And when you say the grade loss is 6 higher, what do you mean? 7 A. Because you're not able to use mediums. 8 Smalls -- which, you saw in the list we sell medium, 9 we sell large, we sell extra-large, we sell jumbo. 10 If -- and a chicken produces 70 to 11 80 percent large, extra-large, which is what -- 12 pretty much what we sell, 8 to 10 percent mediums, 6 13 to 8 percent jumbos, you're not able to utilize 14 those mediums and those jumbos in a retail pack. So 15 therefore they go as a grade loss. 16 Q. And grade loss means they are used as 17 breakers, do you know, or what they're used for? 18 A. I'm not sure what they do with them. 19 They're not -- 20 Q. Kroger won't buy them? 21 A. We don't buy them. 22 Q. And that raises the producer's cost? 23 A. Yes. 24 Q. From whom do you buy these specialty 25 lines? You mentioned Rose Acre Farms for one of</p>

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<p style="text-align: center;">94</p> <p>them. But do you have suppliers for the others?</p> <p>A. For what time period?</p> <p>Q. I'd like to start from whenever Kroger started offering. Maybe we should begin with when did Kroger start offering these specialty lines?</p> <p>A. I'm not sure what they started offering.</p> <p>But Eggland's Best had the contracts in the beginning. And due to poor performance, they lost the contracts.</p> <p>Q. Do you know when Eggland's Best lost the contracts?</p> <p>A. Exactly, no.</p> <p>Q. Roughly?</p> <p>A. I'd have to say it was probably in the 2008/2009 category.</p> <p>Q. Do you know when Eggland's Best was first contracted with for the supply of specialty line eggs?</p> <p>A. No, I do not.</p> <p>Q. Do you know how long Kroger has been selling specialty line eggs?</p> <p>A. No, I do not.</p> <p>Q. So when Kroger lost the contract, to whom did Kroger turn for supply of specialty eggs?</p> <p>MR. MURRAY: Objection to the form of</p>	<p style="text-align: center;">96</p> <p>A. Chino Valley.</p> <p>Q. Which type of eggs does Chino Valley supply?</p> <p>A. Well, let me give you a little history to help you understand this so you don't get real confused. We used to have Private Selection.</p> <p>We had another line called Naturally Preferred. Naturally Preferred was handled -- it was a specialty egg, handled by our natural group at Krogers, instead of the grocery section.</p> <p>When they took the category over, a lot of KMAs, both the SKUs were being featured side by side on the shelves, especially as you went west.</p> <p>I went back to the category managers said, This is insane. Why are you competing against your own product? Give me one label, it will increase sales because we're not competing against ourselves. We'll offer the customer a fresher product because we've not having two SKUs turned there. Quite confusing them.</p> <p>So I said, give them a product that's Private Selections, Naturally Preferred, or whatever. And they said, we have a new product coming out. We got a new name we're working on, and they introduced Simple Truth.</p>
<p style="text-align: center;">95</p> <p>the question.</p> <p>THE WITNESS: Kroger didn't lose the contract.</p> <p>BY MS. LEVIN:</p> <p>Q. I thought you said that Eggland's Best had the contract at first and then they lost it.</p> <p>A. They did. Eggland's Best lost the contract.</p> <p>Q. I'm sorry. What did I say, Kroger?</p> <p>A. You said Kroger.</p> <p>Q. Okay. Well, who got the contract after Eggland's Best lost it?</p> <p>A. Midwest Poultry.</p> <p>Q. Midwest. And did Midwest take over the full supply of specialty eggs?</p> <p>A. They took over all the cage free except for the organics.</p> <p>Q. Who got the supply of organic eggs?</p> <p>A. Moark.</p> <p>Q. And have Midwest and Moark supplied all your specialty line eggs from the date Eggland's Best lost the contract until the present?</p> <p>A. No.</p> <p>Q. Who else has supplied specialty eggs in that time period?</p>	<p style="text-align: center;">97</p> <p>At that time we turned around and consolidated Naturally Preferred and Private Selection.</p> <p>Q. Into Simple Truth?</p> <p>A. Into Simple Truth.</p> <p>Q. And is Simple Truth the brand name today?</p> <p>A. Yes.</p> <p>Q. And in the course of that consolidation and that sort of thing, were additional suppliers added?</p> <p>A. Additional suppliers were added.</p> <p>Suppliers were --</p> <p>Q. Subtracted?</p> <p>A. We realigned ourselves with the current supplier base. Chino Valley was supplying all the Natural Preferred product to the entire Kroger division.</p> <p>I cut them way back to only supplying California and the Northwest. Midwest Poultry picked up the cage-free products for all the eastern KMAs, Dillons and Southwest. Moark does the organic. Rose Acres picked up cage-free browns and omega-3s to Tolleson, and Moark is backfilling with the cage-free whites and the organics, as well as</p>

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<p style="text-align: center;">98</p> <p>Moark picked up Smith's Layton, and California Ralphs and Food-4-Less.</p> <p>Q. And all of these eggs that you're describing, and all of these suppliers that you're describing provide eggs not at a market-driven price but at what you described as flat cost or flat price?</p> <p>A. Yes, ma'am. Yes.</p> <p>Q. For the entire time period that Kroger has purchased from them?</p> <p>A. Yes.</p> <p>Q. Page 5 of Exhibit 42 references 95 percent of all eggs sold at Kroger are banner brands.</p> <p>Can you explain that statement.</p> <p>A. Yes. If you would look at the egg case, basically it's telling you out of every hundred dozen that are purchased through the register, 95 percent of them are Kroger brand product.</p> <p>Q. Either Kroger or one of the banner -- Kroger banners?</p> <p>A. Correct.</p> <p>Q. Okay. And does that include the Private Selection?</p> <p>A. Yes.</p>	<p style="text-align: center;">100</p> <p>A. Of Simple Truth.</p> <p>Q. Right.</p> <p>A. And we typically -- and the reason I'm hesitating is typically we sell anywhere from 280 to 350 million. So the -- I guess what I'm questioning is, I always thought Private Selection was around 15 percent, but it couldn't be because of the amount of growth that we've experienced in the Simple Truth, because we didn't sell near that many Private Selection eggs.</p> <p>So I think my 15 percent is an inaccurate number.</p> <p>Q. You think 15 percent is not the right number for today's sales of specialty eggs?</p> <p>A. No, that's not what I said. I said Private Selection, I told you, was around 15 percent.</p> <p>Q. Right.</p> <p>A. I think it's -- when we had the Private Selection brand, it was much less.</p> <p>Currently today, we were anywhere 25 million against a total egg sales of 300 million plus.</p> <p>Q. Have the sales of specialty eggs grown over time?</p>
<p style="text-align: center;">99</p> <p>Q. Do you know what percentage of the eggs sold by Kroger are Private Selection?</p> <p>A. Yes.</p> <p>Q. What's that?</p> <p>A. 15 percent.</p> <p>Q. How long has 15 percent been the answer to that question?</p> <p>A. Currently it's no longer 15 percent.</p> <p>Q. Okay. What is it today?</p> <p>A. But when we were selling Private Selection -- Private Selection is gone.</p> <p>Q. I understand. It's Simple Truth today.</p> <p>A. Yes.</p> <p>Q. But your specialty egg business -- let me phrase it that way -- what is the percentage of your sales of specialty eggs today?</p> <p>A. Today it's probably upwards around -- I don't know. I'd have to look at the numbers. I know what they are.</p> <p>We've had a tremendous growth with specialty eggs, but last year we finished it real short of 25 million dozen.</p> <p>Q. 25 million dozen --</p> <p>A. Yes.</p> <p>Q. -- specialty eggs?</p>	<p style="text-align: center;">101</p> <p>A. Immensely.</p> <p>Q. And when did Kroger first introduce them?</p> <p>A. We introduced the Simple Truth brand about two and a half years ago.</p> <p>Q. Well, I understand that. But I'm talking about Private Selection, going back to when you first produced -- when Kroger first started selling specialty eggs, whether it's under the Private Selection label, Simple Truth, or whatever label you might care to put on them.</p> <p>A. I don't know.</p> <p>Q. Do you have an approximate date?</p> <p>A. No.</p> <p>Q. Since 2010, can you tell me what sort of growth Kroger has experienced in the sales of specialty eggs?</p> <p>A. I can tell you from -- that we had it in 2005. And around 2010 is when we introduced -- 2010/2011 we introduced Simple Truth, and the category last year grew at 39 percent.</p> <p>Q. Excuse me?</p> <p>A. The category last year grew at 39 percent.</p> <p>Q. The sales grew at 39 percent?</p>

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<p style="text-align: center;">102</p> <p>1 A. Yes. 2 Q. Of Simple Truth? 3 A. Yes. 4 Q. So to make sure I'm clear, Mr. Stull was 5 in charge of procuring the shell eggs from 2000 to 6 2006 or so, and then you took over those job 7 responsibilities. 8 A. Yes. 9 Q. And looking at Exhibit 42 again just 10 briefly, on Pages 6 and 7 there's a map of Kroger 11 distribution facilities, and then suppliers by 12 geographic area. 13 Do you see that? 14 A. Yes, I do. 15 Q. And are the distribution -- or the 16 little blocks on the map on Page 6 of Exhibit 42 the 17 KMAs that you've been referring to? 18 A. Yes. 19 Q. And this was the KMAs as they existed in 20 August of 2004? 21 A. Yes. 22 Q. Were those KMAs the same in 2010? 23 A. I'm sure they were not. 24 Q. Can you tell us how they differed from 25 what you included in your presentation in</p>	<p style="text-align: center;">104</p> <p>1 of those KMAs was taken away from mid south and 2 Atlanta and used to create a Nashville KMA? 3 A. Yes. 4 Q. And there may be some other similar 5 instances of that having occurred on this map 6 between 2004 and 2010? 7 A. Yes. 8 Q. Why, if the map from August of 2004 was 9 not reflecting the current reality in 2010, did you 10 use it in your presentation? 11 A. It was just used as a representation to 12 kind of give them an idea how we marketed eggs. It 13 wasn't meant to be an exact -- you know, this is 14 exactly what we're doing. It was to help them gain 15 a base understanding. 16 Q. So someone looking at this today would 17 also gain a base understanding of what types of 18 distribution regions Kroger has? 19 A. Yes. 20 Q. May not be 100-percent accurate, but 21 it's the general idea. 22 A. Yes. We weren't trying to make them the 23 most knowledgeable person in the area of egg 24 procurement. We were trying to give them a base 25 understanding of how eggs were procured in different</p>
<p style="text-align: center;">103</p> <p>1 Exhibit 42? 2 A. They're always expanding to different 3 market areas and opening new stores, so if they 4 expanded some of these marketing areas, I don't 5 think this would be accurate. 6 Q. What do you mean by expanded marketing 7 areas? 8 A. Open new stores in new areas, new 9 cities. 10 Q. Well, can you give me an example of 11 somewhere on this map that you think things changed? 12 A. You take the Great Lakes, isn't Great 13 Lakes. It goes to Delaware warehouse, which is now 14 Columbus and Michigan. 15 So that's definitely changed. It's 16 split. 17 They've realigned mid south in Atlanta 18 with the Nashville KMA. Atlanta gave up some 19 stores, mid south gave up some stores, and they now 20 have the Nashville KMA, which is a combination of 21 those two -- stores from those two groupings. 22 Q. So if I could just pause there for a 23 second to make sure I understand, on Page 6 of 24 Exhibit 42 there's an Atlantic KMA and there's a mid 25 south KMA; and you're saying that some chunk of each</p>	<p style="text-align: center;">105</p> <p>1 regions for different KMAs. 2 Q. And the list of suppliers on Page 7, was 3 that an accurate list of suppliers by geographic 4 area as of 2010? 5 A. At the time, yes. 6 Q. We can look at contracts that have been 7 produced in the litigation to determine any changes 8 that may have been made in these suppliers over 9 time? 10 A. Yes. 11 Q. Tell me what factors Kroger took into 12 account in deciding to whom to award a shell egg 13 contract. 14 And if it's changed over time, I'd like 15 to hear that, but I suspect it's been pretty similar 16 from 2000 through today, but you'll tell me if 17 that's not right. 18 A. Three criterias that Kroger looks at 19 when they're looking at a supplier. First is 20 service; second, quality; third is price. 21 A supplier that has great quality and 22 great price but doesn't deliver stores to our -- 23 excuse me -- doesn't deliver eggs to our stores when 24 we need them, regardless of the quality and price, 25 is not a supplier we need, because we need to have</p>

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<p style="text-align: center;">106</p> <p>1 the product on the shelf when we need it. 2 Secondly, a criteria is quality. You 3 can have a supplier that has great service and great 4 price but poor quality. It doesn't portray to the 5 Kroger customer what we'd like to portray to them as 6 far as offering them a good-quality product at a 7 competitive cost.</p> <p>8 And thirdly, we look at the cost of the 9 product.</p> <p>10 Q. And in terms of service, is there 11 anything besides timeliness that you take into 12 account?</p> <p>13 A. Define "timeliness."</p> <p>14 Q. Well, I think you're the one who said 15 that the provider had to deliver product in a timely 16 fashion.</p> <p>17 So I guess other issues that I might 18 think of under service might be customer service, 19 for instance? Is that something that's considered 20 under service?</p> <p>21 A. One thing that -- yes, it is. One thing 22 that has changed over the years from the Gary Stull 23 era to my era is that I fully engage the producers 24 from production to the customer. It was their 25 perception when I took the category over, their job</p>	<p style="text-align: center;">108</p> <p>1 I mean -- 2 A. Could be outdated. Could be broken eggs. 3 It could be -- that would be your two primary 4 reasons, damage and date. 5 Q. And is that something that's a part of 6 your evaluation of either service or quality? 7 A. Yes. 8 Q. Which does that fall under? 9 A. Quality. 10 Q. Any factors besides service, quality, 11 and price? 12 A. Well, they got to meet the base criteria 13 first before they even offer to bid, to be a Kroger 14 supplier. 15 Q. What do you mean "meet the base 16 criteria"?</p> <p>17 A. Well, they have to be UEP certified. 18 They have to be SQF Level 2 or higher certified, and 19 they have to have an active vaccination program of 20 at least two alive and one dead SE virus inoculation 21 and maintain that through the life of the birds 22 to -- 23 Q. If you could explain the criteria right 24 before active vaccination. 25 A. Which was?</p>
<p style="text-align: center;">107</p> <p>1 was to pack the eggs, put them in the trailer and 2 close the door, and they were done. 3 I've expanded that now that their 4 responsibility is from production all the way into 5 the consumers' hands. 6 And from that we have put in inspections 7 along the way that helps us identify areas of 8 opportunity, and that does play in the decision of 9 their performance, their service and their quality 10 in being a supplier. 11 Q. So while there may have been some 12 changes that you've made with respect, for example, 13 to customer service, so far as you know, when 14 Mr. Stull was in charge of shell egg procurement, 15 the three criteria in this order were service, 16 quality, and price? 17 A. Yes. 18 Q. So a producer who has the lowest price 19 may not win the bid; correct? 20 A. Correct. 21 Q. Was -- what is shrink control? 22 A. Shrink is the amount of eggs that gets 23 sent into the store that do not scan through the 24 register. 25 Q. Because of what? Are these broken eggs?</p>	<p style="text-align: center;">109</p> <p>1 Q. I have to ask the court reporter to read 2 it back. I didn't quite understand it myself. 3 (Record read.) 4 BY MS. LEVIN: 5 Q. SQF level certified. 6 A. And SQF is the global food safety GFSI 7 certification. 8 Q. So that's a food safety certification. 9 A. It's a food safety. UEP certification 10 deals with bird husbandry in the houses. Once those 11 eggs enter into or through the wall, their criteria 12 no longer is valid. That's where SQF takes over. 13 And SQF is a global -- well, it's part 14 of GFSI, Global Food Safety Initiative; and it's a 15 standard metrics that retailers are using instead of 16 having SQ -- or -- what's the difference? 17 There's different audits that retailers 18 use to require producers to have. This is a one 19 common that -- well, AIB certified was a big one, 20 and there was different -- this is a common metrics 21 that retailers adopted to have kind of a uniform -- 22 unified way to analyze a producer's ability to meet 23 good food compliance standards. 24 Q. Safety type standards? 25 A. Safety type standards, yes.</p>

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<p style="text-align: center;">110</p> <p>1 Q. And with respect to egg products, were 2 service, quality, and price also the three initial 3 criteria that you evaluated suppliers by?</p> <p>A. I have never re-awarded -- I'm sorry.</p> <p>Are you talking about retail egg?</p> <p>Q. Retail egg.</p> <p>A. Okay. I have never awarded anything on that yet. The bid's going out this year.</p> <p>Q. Did you speak with anybody about the award of egg product contracts?</p> <p>A. Yes, spoke with Lisa Beth Miller, Becky Bradley, on the egg products, Randy Payne.</p> <p>Q. And Ms. Bradley told you that she had never bid the egg products?</p> <p>A. She hadn't bid it in the time she had that category.</p> <p>Q. Right; from 2012 to 2014?</p> <p>A. She said they'd just been using the same supplier they had.</p> <p>Q. Prior to that time, do you know what basis there might have been for awarding an egg products contract?</p> <p>A. I do not know.</p> <p>MS. LEVIN: This might be a good moment to take a quick break.</p>	<p style="text-align: center;">112</p> <p>1 Q. And when you say the Kroger corporate 2 office was pricing only the eastern KMA's, what do 3 you mean?</p> <p>A. Yes. The suppliers were sending pricing in to Gary's assistant. She would then formulate the pricing, check it, and send it out to our KMA's.</p> <p>Q. But in terms of soliciting bids, for instance, was there anything different that you did than how Mr. Stull went about it?</p> <p>A. Well, I do know the first RFQ I sent out, the suppliers were very excited. They said it was the first time they've ever had an opportunity to bid on these KMA's.</p> <p>Q. Can you explain what you mean? Mr. Stull did not send out RFQs to your understanding?</p> <p>A. I don't know. I can't say.</p> <p>Q. Well, you said that they were excited, that the suppliers were excited.</p> <p>A. Yes.</p> <p>Q. So at least from the suppliers' perspective, this was the first time that they had seen an RFQ?</p> <p>A. They had an opportunity to bid on those KMA's, and I don't know if it was the eastern KMA's</p>
<p style="text-align: center;">111</p> <p>1 THE VIDEOGRAPHER: We are going off the record. Time on video is 11:47. (Recess taken.)</p> <p>4 THE VIDEOGRAPHER: We are going back on the record. Time on video is 11:59.</p> <p>5 BY MS. LEVIN:</p> <p>7 Q. Mr. Klump, when you took over from Mr. Stull with respect to shell egg procurement, did you change anything about the way in which procurement was done?</p> <p>A. Explain what you're asking.</p> <p>Q. Well, I'm just wondering if you changed anything about the process or the criteria that were used, anything at all.</p> <p>A. Yes.</p> <p>Q. What did you change?</p> <p>A. Well, several things that we took control of immediately. With the 18 KMA's, the only -- the Kroger corporate office was only pricing the eastern KMA's.</p> <p>What I mean by the eastern KMA's, it would have been the Mid-Atlantic, the Atlanta, Cincinnati central, the Delaware warehouse, which was Columbus, Michigan; the Dillons in the southwest KMA, which was Houston/Dallas.</p>	<p style="text-align: center;">113</p> <p>1 that were in reference to or what. But they said prior to that, with the exception of the GNX, they had not been given an open opportunity to compete for that business.</p> <p>5 Q. And this was just with respect to eastern KMA's?</p> <p>A. The first RFQ I sent out, I sent it out to all 18 KMA's at one time.</p> <p>9 Q. Were there individual RFQs for specific KMA's?</p> <p>A. No.</p> <p>Q. Was a single RFQ for all KMA's?</p> <p>A. Yes.</p> <p>Q. And as far as you know, there were some suppliers who were excited because they were now getting to bid on KMA's that they had not previously had an opportunity to bid on?</p> <p>A. Correct.</p> <p>Q. So far as you know, Mr. Stull was not sending out an RFQ for all KMA's to a wide number of suppliers?</p> <p>A. I would surmise that, yes.</p> <p>Q. Do you know whether Mr. Stull sent out RFQs just for individual KMA's?</p> <p>A. I do not know.</p>

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<p style="text-align: center;">114</p> <p>1 Q. To whom did you send out the RFQ?</p> <p>2 A. Send it to all current suppliers and</p> <p>3 other suppliers that expressed an interest in the</p> <p>4 business.</p> <p>5 Q. Okay. So, for example, if -- Midwest</p> <p>6 was one of your suppliers at that moment; correct?</p> <p>7 A. Yes.</p> <p>8 Q. And Midwest had a number of KMAs that</p> <p>9 were in the central part of the country; correct?</p> <p>10 A. Yes.</p> <p>11 Q. They would also receive an RFQ at this</p> <p>12 point that would include Ralphs and Food-4-Less on</p> <p>13 the West Coast?</p> <p>14 A. Yes.</p> <p>15 Q. And any supplier on the West Coast, such</p> <p>16 as NuCal, would receive this RFQ for the</p> <p>17 Mid-Atlantic -- that would include the Mid-Atlantic</p> <p>18 region?</p> <p>19 A. Yes.</p> <p>20 Q. And in the past they had not had an</p> <p>21 opportunity to bid on such a broad array of KMAs?</p> <p>22 A. Yes.</p> <p>23 Q. Why you send out the RFQ for all KMAs to</p> <p>24 all current suppliers?</p> <p>25 A. Because there was no clear direction in</p>	<p style="text-align: center;">116</p> <p>1 yes.</p> <p>2 Q. So the idea was to -- regardless of</p> <p>3 whether each of these potential suppliers was going</p> <p>4 to bid on each of these KMAs, you wanted to</p> <p>5 ascertain which suppliers would bid on which KMA?</p> <p>6 A. Correct.</p> <p>7 Q. And get a baseline for what a</p> <p>8 competitive price would be with respect to each KMA?</p> <p>9 A. Correct.</p> <p>10 Q. And ascertain exactly who was able to</p> <p>11 compete in which KMA?</p> <p>12 A. Yes.</p> <p>13 Q. Do you believe that this process of</p> <p>14 sending out the RFQ to all potential egg suppliers</p> <p>15 resulted in more competitive pricing?</p> <p>16 MR. MURRAY: Object to the form of the</p> <p>17 question. Calls for speculation.</p> <p>18 You can answer if you know.</p> <p>19 THE WITNESS: Yes, it did.</p> <p>20 BY MS. LEVIN:</p> <p>21 Q. And that was your goal, certainly;</p> <p>22 correct?</p> <p>23 A. Yes.</p> <p>24 Q. And were you able to bring Krogers'</p> <p>25 acquisition or costs down as a result of this new</p>
<p style="text-align: center;">115</p> <p>1 the record. The last time the KMAs had been bid at</p> <p>2 the end of 2006, we were going off the cost-plus</p> <p>3 pricing that we had had with Midwest Poultry.</p> <p>4 So in order to establish a baseline, we</p> <p>5 went out to bid on all KMAs.</p> <p>6 Q. I'm not sure I understand what going off</p> <p>7 cost-plus for Midwest has to do with allowing NuCal</p> <p>8 to bid on the Atlanta, for example, division.</p> <p>9 A. First of all, NuCal wouldn't bid on --</p> <p>10 Q. Well, I understand but you gave them the</p> <p>11 opportunity.</p> <p>12 A. Correct.</p> <p>13 Q. So I'm not understanding why changing</p> <p>14 the method in which you priced with Midwest had an</p> <p>15 impact on your distribution of an RFQ.</p> <p>16 MR. MURRAY: Objection to the form. I</p> <p>17 don't think that's a question.</p> <p>18 You can respond if you understand it.</p> <p>19 THE WITNESS: I mean, we wanted to get a</p> <p>20 baseline bid out on them. We had no records of the</p> <p>21 last baseline, so we were establishing one.</p> <p>22 BY MS. LEVIN:</p> <p>23 Q. Was the idea to try to determine exactly</p> <p>24 which producers could compete in which KMAs?</p> <p>25 A. It was get the most competitive costs,</p>	<p style="text-align: center;">117</p> <p>1 process of delivering the RFQ to a broader range of</p> <p>2 producers?</p> <p>3 A. Yes.</p> <p>4 Q. Why don't you take a look in your pile</p> <p>5 there at Exhibit 17.</p> <p>6 Before I ask you a question about that,</p> <p>7 did you believe that prior to your taking over the</p> <p>8 egg procurement process, that Kroger was not getting</p> <p>9 necessarily the most competitive price it could get</p> <p>10 for shell eggs?</p> <p>11 MR. MURRAY: Object to the form of the</p> <p>12 question. Calls for speculation.</p> <p>13 THE WITNESS: I don't know.</p> <p>14 BY MS. LEVIN:</p> <p>15 Q. But you anticipated and found that the</p> <p>16 new procedure that you implemented did, in fact,</p> <p>17 obtain a more competitive price for eggs, for shell</p> <p>18 eggs?</p> <p>19 A. Competition brings better pricing.</p> <p>20 Q. Right. And as a result of a more</p> <p>21 competitive bid process, you got better pricing;</p> <p>22 correct?</p> <p>23 A. Yes.</p> <p>24 Q. I wanted you to take a look at Exhibit A</p> <p>25 to Exhibit 17, which is the chart that begins around</p>

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<p>118</p> <p>1 Page 10.</p> <p>2 A. Okay.</p> <p>3 Q. And my understanding from the text of</p> <p>4 Exhibit 17 is that you assisted in preparing this</p> <p>5 chart; is that correct?</p> <p>6 A. It came from my electronic records.</p> <p>7 Q. Okay. And it's a listing of all of the</p> <p>8 suppliers of shell eggs from 2004 to 2013; is that</p> <p>9 correct?</p> <p>10 A. Is that a question to me?</p> <p>11 Q. Yes.</p> <p>12 A. Could you restate the question.</p> <p>13 Q. I asked if it was a list of all the</p> <p>14 suppliers of shell eggs to Kroger between 2004 and</p> <p>15 2013.</p> <p>16 A. You're going to need to give me a 17 minute, because I have to go through and check every 18 one of them.</p> <p>19 The answer would be yes.</p> <p>20 Q. And it's intended to represent the date</p> <p>21 of the contract, the supplier of the eggs, the type</p> <p>22 of eggs covered by the contract, and then the</p> <p>23 contract price; is that correct?</p> <p>24 A. Well, the contracted price can change 25 through the period of the contract based on input</p>	<p>120</p> <p>1 A. Yes, I do.</p> <p>2 Q. What is that method?</p> <p>3 A. It's based off trades between producers 4 off ECI and the UEP surplus market.</p> <p>5 Q. What is ECI?</p> <p>6 A. Egg Trading Commission or something.</p> <p>7 It's a board where producers post their overages and 8 basically sell them between producers. Or to 9 breakers or --</p> <p>10 Q. And that information forms the basis for</p> <p>11 the Urner Barry price?</p> <p>12 A. Basically from my understanding is that 13 the Urner Barry group looks at the trades, that 2 to 14 3 percent of trades between producers in determining 15 whether those trades are selling at a flat cost, a 16 discounted cost, or a premium cost, to determine 17 which way the metrics in the market should move.</p> <p>18 Q. And so Urner Barry then sets this price</p> <p>19 by egg size; is that correct?</p> <p>20 A. Yes.</p> <p>21 Q. And by region; is that correct?</p> <p>22 A. Yes.</p> <p>23 Q. Do you know how many regions there are</p> <p>24 for Urner Barry prices?</p> <p>25 A. Yes.</p>
<p>119</p> <p>1 costs of cartons and chippers.</p> <p>2 Q. Okay. So to that, I'd say no. But to</p> <p>3 the other part I would say yes.</p> <p>4 Q. But under pricing terms on Exhibit A to</p> <p>5 Exhibit 17, there's some information entered. What</p> <p>6 is that information?</p> <p>7 A. That is the basis behind the 8 differential on your -- on that Urner Barry market 9 is --</p> <p>10 Q. Can you explain what you mean by that.</p> <p>11 A. Okay. The market -- we use a -- we've 12 had different pricing metrics over the years. We 13 used to use a four-week trailing average where we 14 would average the Thursday close --</p> <p>15 Q. You're going to have to slow down for</p> <p>16 people to understand this.</p> <p>17 A lot of your contracts are priced off</p> <p>18 of Urner Barry; is that correct?</p> <p>19 A. Yes.</p> <p>20 Q. What is Urner Barry?</p> <p>21 A. Urner Barry is a third-party company 22 that sets egg prices -- egg as well as other 23 commodities.</p> <p>24 Q. Do you know how it goes about setting</p> <p>25 egg prices?</p>	<p>121</p> <p>1 Q. How many?</p> <p>2 A. There are five.</p> <p>3 Q. And that's five across the entire United</p> <p>4 States?</p> <p>5 A. Yes. There's the northwest -- I'm 6 sorry, the northeast, the southeast, Midwest, south 7 central, and the California market.</p> <p>8 Q. And do those regions -- presumably if</p> <p>9 Urner Barry sets a price by region, those prices may</p> <p>10 vary by region?</p> <p>11 A. Yes, they do.</p> <p>12 Q. So the Urner Barry price for a Grade A</p> <p>13 jumbo egg in the Midwest may be different than the</p> <p>14 price for a Grade A jumbo egg in south central?</p> <p>15 A. Yes. It will be cheaper.</p> <p>16 Q. And from one week to the next, the Urner</p> <p>17 Barry price for a Grade A jumbo egg in the Midwest</p> <p>18 may go up from week to week, while in the south</p> <p>19 central it might go down in that same time period?</p> <p>20 A. Typically not.</p> <p>21 Q. But could that happen?</p> <p>22 A. Possible. But not probable.</p> <p>23 Q. And in the next-to-last column -- well,</p> <p>24 we were talking about Urner Barry.</p> <p>25 So the Urner Barry index is used. It's</p>

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<p style="text-align: center;">122</p> <p>1 by egg size and by region. And then how do you use 2 that in determining your price?</p> <p>3 A. I started to say, we had different 4 pricing metrics. We used to take the Thursday close 5 of the Urner Barry. We would average those together 6 and come up with a -- say for each week they closed, 7 Midwest large would close at a dollar. At the end 8 of that -- you average those four together, it would 9 be a dollar minus the differential for whatever that 10 was negotiated, and that would be the egg cost being 11 delivered to our warehouse.</p> <p>12 Q. The differential is this number that 13 appears in the "Pricing/Terms" column?</p> <p>14 A. Yes, differential or basis. People call 15 them different things.</p> <p>16 Q. So the eggs that have some sort of Urner 17 Barry information in the pricing and terms column 18 are priced relative to the four-week average of the 19 Urner Barry, at least for some time period?</p> <p>20 A. For a time period. In -- what changed 21 at the end of the 2006 is that there was a directive 22 from the president of retail that they wanted to be 23 closer to the market, that we were retailers and our 24 forte was we could retail with the best of them, so 25 give us a competitive retail cost and let us do what</p>	<p style="text-align: center;">124</p> <p>1 of the Urner Barry as you have described it; one 2 group of contracts used cost-plus, and that was 3 Midwest; is that right?</p> <p>4 A. Yes.</p> <p>5 Q. And then in the Smith's intermountain 6 region, a sliding scale was used; is that correct?</p> <p>7 A. Yes.</p> <p>8 Q. And what is the sliding scale?</p> <p>9 A. I knew you were going to ask that.</p> <p>10 Q. It's very predictable, isn't it?</p> <p>11 A. Okay.</p> <p>12 Q. Okay.</p> <p>13 A. I'm trying to see the easiest way to 14 explain this to you.</p> <p>15 The sliding scale is the same as the 16 four-week rolling average. You use the same metrics 17 to come up with the market price.</p> <p>18 Q. So it's also using Urner Barry --</p> <p>19 A. Urner Barry --</p> <p>20 Q. -- trailing average?</p> <p>21 A. -- and you're taking the Thursday close, 22 and you're averaging -- you're dropping the oldest 23 and adding the newest each week to come up with a 24 price.</p> <p>25 That price then goes into just what it</p>
<p style="text-align: center;">123</p> <p>1 we do.</p> <p>2 That's when we moved away from the 3 cost-plus pricing, moved away from the four-week 4 trailing average, and went to a four-week rolling 5 average.</p> <p>6 Q. Could you take a look at Page 25 of 7 Exhibit 52, and see if that's an explanation of what 8 you were just discussing.</p> <p>9 MR. MURRAY: I think you meant 10 Exhibit 42 -- 52.</p> <p>11 MS. LEVIN: No. Oh, I'm sorry, 42, no, 12 you're right. 52 is in my little binder here.</p> <p>13 THE WITNESS: No wonder I couldn't find 14 it.</p> <p>15 What page?</p> <p>16 BY MS. LEVIN:</p> <p>17 Q. 25. 25 and 26.</p> <p>18 A. And your question is?</p> <p>19 Q. My question is whether Pages 25 or 26 20 are a summary of what you were just describing?</p> <p>21 A. Yes.</p> <p>22 Q. So in 2006, there were three different 23 methods used for shell egg pricing?</p> <p>24 A. Yes.</p> <p>25 Q. One used the four-week trailing average</p>	<p style="text-align: center;">125</p> <p>1 says, a sliding scale. And basically the premise of 2 a sliding scale is that you figure out what your, 3 basically your true cost of production would be.</p> <p>4 And you look at it right now, and you 5 say it's 88 cents to a dollar per dozen. At that 6 cost you would have your base differential or 7 differential set, say it would be 20 back, okay.</p> <p>8 If the market would tend to decline 9 lower than that -- say your dollar is your cost-even 10 price, you have a decreasing differential that 11 occurs on either three to 5-cent intervals; or if 12 the market would increase, you would have an 13 increasing differential to offset the change in the 14 market.</p> <p>15 Q. So the idea of a sliding scale is to 16 kind of smooth out the peaks and valleys? Is 17 that --</p> <p>18 A. No, it's to --</p> <p>19 MR. MURRAY: Object to the form of the 20 question.</p> <p>21 You can answer.</p> <p>22 THE WITNESS: It's to offer increased 23 discounts at higher market times and increased 24 protection for the producer at bad market times.</p> <p>25 BY MS. LEVIN:</p>

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<p style="text-align: center;">126</p> <p>1 Q. And bad market times are when the Urner 2 Barry is low? 3 A. Yes. They're -- the cost of the Urner 4 Barry market drops below their costs of production. 5 Q. The cost of production. 6 And there have been occasions in your 7 time period or during Mr. Stull's time period when 8 the Urner Barry dropped below the producer's cost of 9 production? 10 A. Yes. 11 Q. Do you know when those times were? 12 A. Typically it's after Easter and before 13 kids go back to school. 14 MS. LEVIN: Let's take a look at 15 Exhibit -- or Page 27 of Exhibit 42, which is 16 entitled "Egg Market Volatility." 17 THE WITNESS: Yes. 18 BY MS. LEVIN: 19 Q. That's a document -- a chart that you 20 included in your presentation; correct? 21 A. Yes, it is. 22 Q. And is that intended -- well, why don't 23 you tell me what that page shows. 24 A. Got to find it first. What page did you 25 say it was?</p>	<p style="text-align: center;">128</p> <p>1 the 5-cent mark. 2 Can you tell me what that's showing. 3 A. Those are changes in the Urner Barry 4 market in that period of time. 5 Q. So for that particular week -- and it's 6 hard to see from this chart what that week is, but 7 maybe the first week in February 2005, the Urner 8 Barry price went up 5 cents? 9 A. In one week, yes. 10 Q. In one week. 11 And then by a couple of weeks later, it 12 had dropped down to -- down by maybe 8 cents, down 13 to the zero level mark and then down another 3 14 cents? 15 Am I reading that roughly correctly? 16 A. Yes, you are. 17 Q. And the zero line across the middle is 18 just whatever the Urner Barry price was the day that 19 this chart was begun? 20 A. Correct. 21 Q. What does the word "volatility" mean? 22 MR. MURRAY: Objection, form of the 23 question. 24 You can answer. 25 THE WITNESS: Just what it states.</p>
<p style="text-align: center;">127</p> <p>1 Q. 27, it's right after the pages we were 2 looking at. 3 A. Your question is what does this graph 4 show? 5 Q. Yes. 6 A. It shows market swings in the Urner 7 Barry through a period of 2005 through 2010. 8 Q. And by market swings, what do you mean? 9 A. Changes in market pricing, in Urner 10 Barry pricing for that time frame. 11 Q. And can you explain to me what the -- 12 the horizontal axis is date. I understand that, but 13 what about the vertical axis? 14 A. The vertical axis is cost, cost per 15 dozen in the Urner Barry market. 16 Q. Costs to whom? 17 A. This is what the Urner Barry is 18 reporting. 19 Q. So this is showing changes in the Urner 20 Barry price in the market? 21 A. It's showing market volatility as it's 22 being priced by the Urner Barry market for the 23 Thursday close. 24 Q. So let's just take that first little 25 peak there where the dark line goes up and it hits</p>	<p style="text-align: center;">129</p> <p>1 BY MS. LEVIN: 2 Q. Well -- 3 A. Market changes. The erratic changes in 4 the marketplace. 5 Q. And there's -- are erratic changes in 6 the price of eggs in the marketplace? 7 A. Increasing every year. 8 Q. Well, within a particular year, it would 9 appear that the price goes up and down quite a bit, 10 doesn't it? 11 A. Yes, it does. 12 Q. And what is the reason for that? If you 13 know. 14 A. Just what we said: It's overproduction 15 or a shortage in the marketplace. 16 Q. And when there is overproduction of 17 eggs, what happens with the price? 18 A. The market goes down. 19 Q. And when there's underproduction, what 20 happens? 21 A. The market goes up. 22 Q. And that's all other things being equal? 23 A. Correct. 24 Q. When there are other sorts of external 25 influences upon supply and demand, that would also</p>

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<p style="text-align: right;">130</p> <p>1 have an effect on the price; correct?</p> <p>2 A. Explain.</p> <p>3 Q. Well, for example, if there is a</p> <p>4 seasonal demand, for example, around Easter.</p> <p>5 A. Falls in the same market principle.</p> <p>6 Q. Which is?</p> <p>7 A. Increase demand, increase cost.</p> <p>8 Q. Increase price to Kroger, right?</p> <p>9 A. Yes.</p> <p>10 Q. And if there's some sort of dietary</p> <p>11 preference for eggs in the marketplace, that could</p> <p>12 also increase demand; correct?</p> <p>13 A. Yes.</p> <p>14 MR. MURRAY: Objection; speculative.</p> <p>15 BY MS. LEVIN:</p> <p>16 Q. And, therefore, increase the price?</p> <p>17 MR. MURRAY: Same objection.</p> <p>18 BY MS. LEVIN:</p> <p>19 Q. Mr. Klump, you've been in charge of egg</p> <p>20 procurement since 2006 at Kroger; correct?</p> <p>21 A. Yes.</p> <p>22 Q. You do have some understanding of shell</p> <p>23 egg pricing; correct?</p> <p>24 A. Yes.</p> <p>25 Q. And you have an understanding of the</p>	<p style="text-align: right;">132</p> <p>1 weekly changes and average them over four weeks.</p> <p>2 So if you would tend, in a higher</p> <p>3 holiday period -- I mean, you look at this</p> <p>4 volatility chart, there's changes in some weeks of</p> <p>5 10 cents or more, 12 cents, and decreases of</p> <p>6 12 percent -- or 12 cents more. You get out farther</p> <p>7 in the chart, we're closer to 15 cents decreases and</p> <p>8 increases.</p> <p>9 What it does is we're not capable at</p> <p>10 shelf, since we do weekly pricing, to keep shelf</p> <p>11 tags changed that quickly; nor do the customers</p> <p>12 understand the Urner Barry pricing and the metrics</p> <p>13 behind egg pricing.</p> <p>14 If we have that volatile of egg pricings</p> <p>15 at shelves, it's perceived as we're either gouging</p> <p>16 the consumer or -- you know, it's not perceived --</p> <p>17 inconsistent pricing at shelf is not an attribute to</p> <p>18 a customer for a strategy.</p> <p>19 Q. So you can't change your shelf prices</p> <p>20 every time your acquisition cost changes; is that</p> <p>21 correct?</p> <p>22 A. That's correct.</p> <p>23 Q. And you have to keep your shelf prices</p> <p>24 flatter than that?</p> <p>25 A. Yes.</p>
<p style="text-align: right;">131</p> <p>1 types of factors that affect shell egg pricing?</p> <p>2 A. Yes.</p> <p>3 Q. You don't have any difficulty answering</p> <p>4 my questions, do you, about egg pricing and what</p> <p>5 affects them?</p> <p>6 A. No.</p> <p>7 Q. So back on Page 26 of Exhibit 42, it</p> <p>8 then talks about current shell egg pricing, and you</p> <p>9 state the four-week rolling average to be closer to</p> <p>10 the market but buffer out the peaks and valleys.</p> <p>11 A. Yes.</p> <p>12 Q. That's what I was calling smoothing out</p> <p>13 the peaks and valleys, but you preferred to use</p> <p>14 different terminology.</p> <p>15 Was the change in pricing that you</p> <p>16 implemented intended to smooth out the peaks and</p> <p>17 valleys that we see in Exhibit 42, Page 27?</p> <p>18 A. Yes.</p> <p>19 Q. And how did that happen? How did that</p> <p>20 occur?</p> <p>21 A. I don't understand your question.</p> <p>22 Q. How does switching to a four-week</p> <p>23 rolling average buffer out the peaks and valleys?</p> <p>24 A. Well, what you're doing, instead of</p> <p>25 looking at every weekly change, you're taking those</p>	<p style="text-align: right;">133</p> <p>1 Q. How often does the price of the eggs</p> <p>2 that you purchase change under the contracts that</p> <p>3 are linked to Urner Barry.</p> <p>4 A. Every week.</p> <p>5 Q. Weekly?</p> <p>6 And how does the trailing average differ</p> <p>7 from the rolling average?</p> <p>8 A. The trailing averages, you would set the</p> <p>9 price, and you would hold that price for the entire</p> <p>10 next month.</p> <p>11 Q. So the price would be set on the</p> <p>12 four-weeks' average Urner Barry, and that would be</p> <p>13 the price you would pay for an entire month?</p> <p>14 A. Right. So take, for instance, we're in</p> <p>15 April. We would average the four Thursday closes in</p> <p>16 March. That would come up the price, we would hold</p> <p>17 that price through April.</p> <p>18 So the KMAs would know their price</p> <p>19 through the entire time frame of April. At the end</p> <p>20 of the April, you would redo the exercise, and you</p> <p>21 would set the price for May.</p> <p>22 Q. But when you switched to the rolling</p> <p>23 average, that price is figured every week based on</p> <p>24 the last four-weeks' average?</p> <p>25 A. Right.</p>

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<p style="text-align: center;">134</p> <p>1 Q. So that explains the language in 2 contracts we see that talk about the four-week 3 trailing average?</p> <p>4 A. Okay.</p> <p>5 Q. Prior to 2006; correct?</p> <p>6 A. Correct.</p> <p>7 Q. Looking back at Exhibit 17, it appears 8 to me -- and you can tell me if this is correct or 9 not. But it appears to me that in 2007 or so, 10 contracts with egg suppliers were no longer 11 executed. It's always listed as a nonexecuted 12 contract.</p> <p>13 And my question to you is whether that's 14 correct and whether there was some additional change 15 you implemented with respect to the execution of 16 contracts.</p> <p>17 A. I can't state what happened prior to 18 2007. I mean, I picked it up in 2006.</p> <p>19 Q. Okay. But did you execute any contracts 20 with shell egg suppliers after you became --</p> <p>21 A. Yes.</p> <p>22 Q. -- the head of procurement?</p> <p>23 A. I'm sorry, yes.</p> <p>24 Q. Did you ever execute a contract, for 25 example, with -- let's look at the bottom of Page 17</p>	<p style="text-align: center;">136</p> <p>1 "nonexecuted contract"?</p> <p>2 A. No.</p> <p>3 Q. But you believe you signed contracts in 4 that time period with Midwest Poultry?</p> <p>5 A. Yes. We had supply agreements with 6 Midwest Poultry.</p> <p>7 Q. Is it possible that these say 8 "nonexecuted contracts" simply because you don't 9 have an executed contract in your file?</p> <p>10 A. I do not know.</p> <p>11 Q. But you're quite sure that such 12 contracts were executed?</p> <p>13 A. Yes.</p> <p>14 Q. With Midwest Poultry; correct?</p> <p>15 A. Yes.</p> <p>16 Q. And there were executed contracts with 17 Norco Ranch after 2007?</p> <p>18 A. Yes.</p> <p>19 Q. What about with Mahard Egg Farm? Did 20 you ever have an executed contract with Mahard Egg 21 Farm?</p> <p>22 A. Yes.</p> <p>23 Q. Do you know why this exhibit says it's a 24 nonexecuted contract?</p> <p>25 A. I do not.</p>
<p style="text-align: center;">135</p> <p>1 and the top of Page 18 where there are listed 2 contracts for -- there's listed something with 3 respect to Norco Ranch for 2010 to 2013?</p> <p>4 A. Page again, please.</p> <p>5 Q. Bottom of 17 and top of 18 on 6 Exhibit 17. You see a number of entries for the 7 period April 23, 2010, through April 23, 2013, for 8 Norco Ranch. And then it says "nonexecuted 9 contract."</p> <p>10 Can you tell me what that means?</p> <p>11 A. I cannot.</p> <p>12 Q. Is it your understanding that there was 13 no written contract with Norco Ranch for that time 14 period?</p> <p>15 A. I don't recall.</p> <p>16 Q. Well, do you recall ever signing 17 contracts for the procurement of shell eggs?</p> <p>18 A. Yes.</p> <p>19 Q. Do you recall signing them after 2007?</p> <p>20 A. Yes.</p> <p>21 Q. Do you recall signing them with Midwest 22 Poultry after 2007?</p> <p>23 A. Yes.</p> <p>24 Q. And can you explain to me why all of the 25 entries for Midwest Poultry after 2007 say</p>	<p style="text-align: center;">137</p> <p>1 Q. Are there any shell egg suppliers with 2 whom you just have a handshake type of a contract?</p> <p>3 A. Yes.</p> <p>4 Q. Who are those?</p> <p>5 A. Right off the top of my head I can't 6 tell you 100 percent for sure. I mean, we would go 7 out -- in 2007 we did all KMAs on RFQ. It was the 8 intent of our department to go out weekly, or 9 weekly -- a yearly and redo that bid process, to 10 rebid it once a year.</p> <p>11 After the amount of work that it took in 12 order to execute that RFQ and the analysis, I told 13 them we weren't going to do all 18 KMAs at the same 14 time, that we were going to break it up into two 15 regions, east and west.</p> <p>16 And then what we would do is do a 17 two-year supply agreement with the west and a 18 three-year supply agreement with the east and get 19 them on alternating years so we didn't deal with all 20 the work that goes out, plus we were getting more 21 competitive pricing if we did a three-year contract 22 than if we did a yearly contract.</p> <p>23 Q. Take a look at Page 8 of Exhibit 42, and 24 see if that's summarizing what you just described 25 for us.</p>

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<p style="text-align: right;">138</p> <p>A. Yes.</p> <p>Q. So the idea was to get some portion of the country on a different timetable from the other portions so you didn't have to do the whole country all at once?</p> <p>A. It was -- yes. To set up a timetable to reach out to the producers through competitive bidding. But yet hold it for a period of time that made sense with the producers to make them efficient through that contract period.</p> <p>Q. You've mentioned moving away from the four-week --</p> <p>A. Trailing.</p> <p>Q. -- trailing average to the four-week rolling average. You also moved away from cost-plus contracts; correct?</p> <p>A. Correct.</p> <p>Q. Was Midwest the only supplier you had on a cost-plus contract in 2007?</p> <p>A. Yes.</p> <p>Q. Why did you conclude that it was best to move away from the cost-plus contract with Midwest?</p> <p>A. I didn't.</p> <p>Q. Why did you move away from the cost-plus contract with Midwest?</p>	<p style="text-align: right;">140</p> <p>price is high?</p> <p>A. The price is high -- higher, because demand is higher.</p> <p>Q. Right.</p> <p>A. Wintertime, people eat more. Holidays, all the other -- there's more of a demand from the supply side.</p> <p>Once it starts to warm up, more people go outside, they tend to eat out more, not eat breakfast as often. The market tanks. Usually stays down below cost for a period until typically if you watch, it's when kids start going back to school, you see an incremental bump.</p> <p>And then once we get the holiday demand we get another bump up, and it holds that level until we hit Easter again.</p> <p>Q. And so for some period between Easter and the kids going back to school, your acquisition cost for shell eggs is below the producer's cost of production?</p> <p>MR. MURRAY: Objection; calls for speculation.</p> <p>BY MS. LEVIN:</p> <p>Q. Did I understand that correctly?</p> <p>MR. MURRAY: You can answer it.</p>
<p style="text-align: right;">139</p> <p>A. I was told to.</p> <p>Q. By whom?</p> <p>A. Don Becker.</p> <p>Q. And who is Mr. Becker?</p> <p>A. The president of retail.</p> <p>Q. And what did Mr. Becker -- how did Mr. Becker go about delivering this?</p> <p>A. Through the category management team. Basically he said he wanted to -- the fact that we were retailers, we were the best retailers out there, and we can retail with anybody; give me a competitive price and I can be competitive with anybody in the marketplace.</p> <p>Q. And was it Mr. Becker's view that cost-plus pricing was not competitive?</p> <p>A. Yes.</p> <p>Q. Why did he believe that cost-plus pricing was not competitive?</p> <p>A. He felt cost-plus pricing was not competitive because it was basically due to the cost inputs. You would come up with a one cost formula for the entire year, which it did not change. Remember the cycles in the egg market. Egg market is high January through Easter --</p> <p>Q. When you say it's high, you mean the</p>	<p style="text-align: right;">141</p> <p>THE WITNESS: I mean, for cost-plus, no.</p> <p>BY MS. LEVIN:</p> <p>Q. Right. I understand not for cost-plus. But --</p> <p>A. But for others, yes.</p> <p>Q. What time period -- you say roughly from Easter to September?</p> <p>A. Easter/September. Or mid September, when kids are --</p> <p>Q. Okay. So the cost-plus, you were in the process of explaining to me why you were moving away from the cost-plus.</p> <p>A. Through those summer months, when other retailers had a pricing advantage on us, because we may have been 70 cents a dozen and the market was sitting at 60 cents a dozen; they couldn't -- "they" being our retail side -- couldn't look at the whole piece of a year. They looked at everything in a four-week segment.</p> <p>And they were looking to P&Ls and the balance through those four-week segments, and even, though, through the entire year it was a benefit, through those summer months we were at a disadvantage.</p> <p>Q. Because the cost-plus was causing you to</p>

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<p style="text-align: center;">142</p> <p>1 pay the producer's cost plus something -- 2 A. We were -- 3 Q. -- whereas other retailers that were not 4 on cost-plus were paying something below the cost of 5 production? 6 A. Correct. 7 Q. Okay. And for your suppliers that were 8 on Urner Barry, the price you were paying to them 9 during those summer months were below their cost of 10 production. Those are the ones you're talking 11 about? 12 MR. MURRAY: Object to the form; calls 13 for speculation. 14 THE WITNESS: Yes. 15 MR. MURRAY: It's 12:40. If we're 16 switching gears -- 17 MS. LEVIN: No, I'm not. I've got two 18 documents I wanted to show him that relate to this 19 issue of the change in the pricing methodology. And 20 I'll look at them. I may look at them and say, 21 never mind. 22 MR. MURRAY: Okay. Then we'll do lunch? 23 MS. LEVIN: Then we'll do lunch. 24 Let's mark as Exhibit 43 a document 25 bearing Bates number KRGEG00018832.</p>	<p style="text-align: center;">144</p> <p>1 about making this change to their contract? 2 A. Yes. 3 Q. What did Cal-Maine say? 4 A. They were fine with it. 5 Q. And do you know why Cal-Maine was fine 6 with it? 7 MR. MURRAY: Same objection, calls for 8 speculation. 9 THE WITNESS: Because the cost impact to 10 them wouldn't be any different. Basically it would 11 put them closer to the market change. 12 BY MS. LEVIN: 13 Q. So the price -- 14 MR. MURRAY: Were you done? 15 THE WITNESS: That's okay. 16 BY MS. LEVIN: 17 Q. There was no real overall price impact 18 to them? Again, this just smoothed out the peaks 19 and valleys? 20 A. Actually, there was a price impact to 21 them. It was probably a benefit towards them, 22 because in times of increasing demand, you -- you 23 tend to -- you're increasing demand because 24 increased sales. It was going to put them closer to 25 the market so they would receive that benefit</p>
<p style="text-align: center;">143</p> <p>1 MS. CRABTREE: What's that number again? 2 MS. LEVIN: KRGEG18832. 3 (Kroger Exhibit 43 was marked for 4 identification.) 5 BY MS. LEVIN: 6 Q. Have you had a chance to review 7 Exhibit 43, Mr. Klump? 8 A. Yes, I have. 9 Q. What is Exhibit 43? 10 A. Exhibit 43 is -- just what we've been 11 talking about, is changing our pricing structure 12 from a four-week trailing to a four-week rolling. 13 Q. And it is a change to your contract with 14 Cal-Maine; is that correct? 15 A. Yes. 16 Q. Is that your signature on Exhibit 43? 17 A. Yes, it is. 18 Q. Was Cal-Maine willing to make this 19 change from four-week trailing to four-week rolling? 20 A. Yes. 21 Q. Why is that? 22 MR. MURRAY: Objection; calls for 23 speculation. 24 BY MS. LEVIN: 25 Q. Did you have discussions with Cal-Maine</p>	<p style="text-align: center;">145</p> <p>1 faster. 2 So it was -- it was probably a pricing 3 advantage towards them compared to the four-week 4 trailing average. 5 Q. And what's -- so there was no push back 6 from Cal-Maine to make this change to their contract 7 in midstream? 8 A. No. 9 MS. LEVIN: And I would like to mark as 10 Exhibit 44 a series of documents bearing Bates 11 No. KRGEGED00012637 through 12646. 12 (Kroger Exhibit 44 was marked for 13 identification.) 14 BY MS. LEVIN: 15 Q. I think you'll find that all of the 16 pages of Exhibit 44 are the same except the 17 addressees. 18 A. Okay. 19 Q. Have you had a chance to review 20 Exhibit 44? 21 A. Yes. 22 Q. What is Exhibit 44? 23 A. Exhibit 44 is a letter that gets sent 24 along with the RFQ to explain what we're looking for 25 in the RFQ.</p>

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<p style="text-align: center;">146</p> <p>1 Q. Is this particular Exhibit 44, or this 2 particular batch of documents, all of which are 3 dated September 6th, 2006, correspondence that was 4 sent in conjunction with what you described as this 5 first occasion on which an RFQ was sent for all 6 KMAs?</p> <p>7 A. Yes.</p> <p>8 Q. And the three variables that you list in 9 Exhibit 44 in terms of the criteria that will be 10 used to review are service, quality, and price, as 11 you testified; correct?</p> <p>12 A. Correct.</p> <p>13 Q. And that correspondence in Exhibit 44 14 doesn't mention anything about compliance with the 15 animal welfare guidelines of UEP; but that was, 16 nonetheless, a requirement; correct?</p> <p>17 A. Yes.</p> <p>18 Q. And you state, "Alternatives to the 19 pricing structures should be submitted separately 20 from the standard RFQ sheet."</p> <p>21 Can you explain that.</p> <p>22 A. Yes.</p> <p>23 Q. Would you explain that.</p> <p>24 A. Sure.</p> <p>25 Q. Thank you.</p>	<p style="text-align: center;">148</p> <p>1 now.</p> <p>2 THE VIDEOGRAPHER: We are going off the 3 record. This is the end of Disk 2. The time on 4 video is 12:46.</p> <p>5 (Luncheon recess from 12:46 p.m. 6 to 1:42 p.m.)</p> <p>7 THE VIDEOGRAPHER: We are going back on 8 the record. Time on video is 13:42. This is the 9 beginning of Disk 3.</p> <p>10 BY MS. LEVIN:</p> <p>11 Q. Mr. Klump, can you look in your pile of 12 exhibits there and find Exhibits 18 through 25.</p> <p>13 It's a series of contracts.</p> <p>14 Got them?</p> <p>15 A. Yes.</p> <p>16 Q. I want to just go back to the testimony 17 you were giving just prior to the lunch break about 18 the RFQ that you sent out in 2006, which was for all 19 Kroger KMAs. And that was sent to a series of 20 suppliers, or potential suppliers.</p> <p>21 Do you recall that testimony?</p> <p>22 A. Yes.</p> <p>23 Q. And if you would take just a quick look 24 at Exhibit 44, are those the suppliers that that RFQ 25 was sent to?</p>
<p style="text-align: center;">147</p> <p>1 A. One thing you don't ever want to do 2 is -- when you're conducting business is always do 3 everything the same way you've always done it. 4 It does not lead the ability to define 5 different and creative ways to deliver a more 6 competitive product to the consumer. 7 So that is in reference to maybe a 8 different pricing metrics that would be more 9 efficient and more consistent for both producer and 10 retailer to deliver a more competitive price at 11 shelf.</p> <p>12 Q. So while the RFQ may have specified a 13 particular pricing metric, you didn't want to 14 discourage other pricing metrics?</p> <p>15 A. Absolutely.</p> <p>16 Q. Do you know what pricing metric was 17 prescribed in this particular RFQ that was to -- 18 that Exhibit 44 was announcing?</p> <p>19 A. It would be market based with a 20 differential behind the market on a four-week 21 trailing -- or rolling average.</p> <p>22 Q. This was the beginning of the rolling 23 average initiative?</p> <p>24 A. Yes.</p> <p>25 MS. LEVIN: Okay, we can take a break</p>	<p style="text-align: center;">149</p> <p>1 A. Exhibit 44?</p> <p>2 Q. Right. It was an exhibit we used right 3 before lunch.</p> <p>4 A. Here it is.</p> <p>5 Q. Is the list of suppliers to whom 6 Exhibit 44 was sent the list of suppliers who 7 received the RFQ in 2006 that sought bids with 8 respect to all KMAs?</p> <p>9 A. Yes.</p> <p>10 Q. Are you looking at Exhibit 44 -- I'm 11 asking about Exhibit 44 right now and whether the 12 suppliers in Exhibit 44 are the suppliers to whom 13 the 2006 RFQ went to.</p> <p>14 A. This is some of the suppliers.</p> <p>15 Q. What other suppliers received the 2006 16 RFQ?</p> <p>17 A. I don't know right off the top of my 18 head.</p> <p>19 Q. Okay. Have you continued, since 2006, 20 to send out RFQs that relate to the -- all KMAs?</p> <p>21 A. No.</p> <p>22 Q. What have you done since 2006?</p> <p>23 A. We broke them into two groups.</p> <p>24 Q. So this is what you were testifying 25 before about the eastern KMAs?</p>

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<p style="text-align: right;">150</p> <p>1 A. Eastern and western, to make it more 2 competitive. Sending it out to 18 KMAs was too 3 large, even for the producers. We were getting -- 4 producers would choose to try to bid on certain 5 segments and worrying about covering all segments, 6 so they were hedging their bids.</p> <p>7 So we found if we went to a multiyear 8 agreement and was more specific to a smaller amount 9 of KMAs, we had a more competitive bid.</p> <p>10 Q. And so the KMAs covered by any 11 particular RFQ after 2006 are either the eastern 12 KMAs or the western KMAs?</p> <p>13 A. Yes.</p> <p>14 Q. And they're not done in the same year; 15 is that right?</p> <p>16 A. No.</p> <p>17 Q. Are they for three-year periods, 18 nonetheless?</p> <p>19 A. No. They used to be a one-year. And 20 then we moved to a two-year. And then when we 21 realized what we tried to achieve, we moved the 22 eastern back, we extended their contract one year 23 and went to a three-year to break that cycle to get 24 it to start flipping.</p> <p>25 Q. And are they now each three-year RFQs</p>	<p style="text-align: right;">152</p> <p>1 down, we review their business performance for that 2 prior year based on shrink and complaints.</p> <p>3 And based on that, we work on an action 4 plan for improvement. And based on that criteria, a 5 supplier lost the supply agreement to the Atlantic 6 KMA due to that.</p> <p>7 Q. What supplier was that?</p> <p>8 A. Rose Acres.</p> <p>9 Q. And to whom did they lose the Atlantic 10 KMA?</p> <p>11 A. To Midwest Poultry.</p> <p>12 Q. And what year was that?</p> <p>13 A. That was three years ago.</p> <p>14 Q. Did that change take place at the end of 15 the supply agreement?</p> <p>16 A. Yes.</p> <p>17 Q. So in the course of evaluating bids for 18 a particular KMA, you've never concluded that one of 19 the bidders can't meet your service requirements?</p> <p>20 A. Restate that question, please.</p> <p>21 Q. In the course of evaluating bids for a 22 particular KMA -- and I'll phrase it differently -- 23 have you ever concluded that one of the bidders 24 could not meet your service requirements?</p> <p>25 A. No.</p>
<p style="text-align: right;">151</p> <p>1 for the east and the west, but they're just off by a 2 year?</p> <p>3 A. Yes.</p> <p>4 Q. So on any given RFQ, multiple suppliers 5 are permitted to bid?</p> <p>6 A. Yes.</p> <p>7 Q. And they're permitted to bid on whatever 8 KMAs are covered by that RFQ?</p> <p>9 A. Yes.</p> <p>10 Q. You mentioned before that the three 11 factors that were important to you were service, 12 quality, and price.</p> <p>13 Do you find that you eliminate potential 14 suppliers on the basis of service when they submit a 15 response to the RFQ?</p> <p>16 A. In my time as procurement manager, I've 17 never had to eliminate a supplier based on service.</p> <p>18 Q. What about on quality?</p> <p>19 A. Yes.</p> <p>20 Q. So when you say you've eliminated the 21 supplier based on quality, has that been during the 22 bid process, you've concluded this is a supplier we 23 can't deal with?</p> <p>24 A. No. Basically at the end of each year I 25 have a business review with the suppliers. I sit</p>	<p style="text-align: right;">153</p> <p>1 Q. So when it comes to evaluating multiple 2 bidders for a particular KMA, if they can all meet 3 your service requirements and they can all meet your 4 quality requirements, does it come down to price?</p> <p>5 A. Yes.</p> <p>6 Q. Do you ever evaluate whether, although 7 all the bidders can meet your service requirements, 8 some might be better at it? Does that ever factor 9 in?</p> <p>10 A. Yes.</p> <p>11 Q. So the award of bids is not based simply 12 on the lowest price?</p> <p>13 A. Price is the third criteria.</p> <p>14 Q. And the mere fact that somebody can meet 15 your service requirements doesn't mean that they'll 16 win the bid if their price is the lowest?</p> <p>17 A. True.</p> <p>18 Q. Take a look at Exhibits 18 through 25. 19 And the first thing I'd like to do is confirm it's 20 your signature on certain of the exhibits.</p> <p>21 So on Exhibit 18, is that your 22 signature?</p> <p>23 MR. MURRAY: Give him a second to get 24 them.</p> <p>25 THE WITNESS: Yes, it is.</p>

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<p style="text-align: center;">154</p> <p>1 BY MS. LEVIN: 2 Q. And on Exhibit 19, there is no 3 signature, but to your understanding, was there a 4 contract with Rose Acre for the Atlanta KMA from 5 2008 until 2011? 6 A. Yes. 7 Q. And was this the contract that was 8 terminated at the end because you were dissatisfied 9 with the performance? 10 A. Yes. 11 Q. Do you know whether there would have 12 been, at some point in time, a signed version of 13 Exhibit 19? 14 A. Probably not, no. 15 Q. And why is that? 16 A. It was just either overlooked or not 17 completed. 18 Q. But this Exhibit 19 is, in fact -- does 19 set forth the terms between Kroger and Rose Acre for 20 the sale of shell eggs to the Atlantic and Phoenix 21 KMAs between April 2008 and April 2011? 22 A. Yes. 23 Q. On Exhibit 20 -- skip the first couple 24 of pages. And beginning on the third page of 25 Exhibit 20 is a contract between Kroger and</p>	<p style="text-align: center;">156</p> <p>1 Q. Do you know whose it is? 2 A. No. 3 Q. Do you know whether there was 4 subsequently a contract between NuCal and Kroger for 5 the period April -- appears to be 2008 to May of 6 2010? 7 A. Yes. 8 Q. There was such a contract? 9 A. Yes. 10 Q. And is the document set forth in 11 Exhibit 22 a correct recitation of the terms with 12 the amendment of the date and the amendment of the 13 Urner Barry market? 14 A. I would say the dates are correct. The 15 market is correct, but I do not know about the 16 differentials. 17 Q. Whether those differentials are correct; 18 is that right? 19 A. I said I do not know -- 20 Q. Right. 21 A. -- whether the differentials are 22 correct. 23 Q. And there's also an edits to change 24 trailing market average to rolling market average? 25 A. Yes, and I can tell you, I know the</p>
<p style="text-align: center;">155</p> <p>1 Cal-Maine for the period February 2007 through April 2 of 2008. And this document is signed by Cal-Maine 3 Foods, but no one has executed it on behalf of 4 Kroger. 5 To your knowledge, is the contract set 6 forth beginning at Pages 404144 of Exhibit 20 a 7 contract that existed between Cal-Maine and Kroger? 8 A. Yes. 9 Q. It just happens never to have been 10 signed; is that correct? 11 A. Correct. 12 Q. Exhibit 21. Is that your signature on 13 Exhibit 21? 14 A. Yes, it is. 15 Q. For Exhibit 22 -- Exhibit 22 has been 16 signed by Mr. Stull; is that correct? 17 A. Yes, it is. 18 Q. And presumably that was for the time 19 period April 2005 to January 2008? 20 A. Yes. 21 Q. And then there's some handwriting where 22 the dates have been changed and the region for the 23 Urner Barry market have been changed. Is that your 24 handwriting? 25 A. No.</p>	<p style="text-align: center;">157</p> <p>1 differentials are not correct, because when we 2 switched off of the Midwest market to the California 3 market, we got much larger differentials due to the 4 fact that the California market runs 14 to 15 cents 5 over the Midwest market. 6 Q. So there would have been some other 7 either signed or unsigned writing between Kroger and 8 NuCal for the period of April 2008 to May 2010 that 9 would have had different differentials off of the 10 California Urner Barry market? 11 A. Yes. 12 Q. And whether -- we don't know where that 13 document is, I guess; is that correct? 14 A. Yes. 15 Q. Exhibit 23 is a contract with National 16 Food Corporation. Is that your signature on 17 Exhibit 23? 18 A. Yes, it is. 19 Q. And for Exhibit 24, a contract with 20 Moark from February 2007 to April 2008. Is that 21 your signature on the fifth page of Exhibit 24? 22 A. Yes, it is. 23 Q. And again, on the page bearing Bates 24 No. KRGE00019193? 25 A. Correct.</p>

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<p style="text-align: center;">158</p> <p>Q. The last three pages of Exhibit 24 are labeled "Addendum Hickman-Moark, Norco-Moark, and again, Hickman-Moark.</p> <p>The first two of those pages were unsigned.</p> <p>To your knowledge, were there ever signed versions of these addenda?</p> <p>A. I do not know.</p> <p>Q. The last page of Exhibit 24 is an addendum for the period January 29, 2006, to February 3, 2007. Is that your signature?</p> <p>A. Yes, it is.</p> <p>Q. And then for Exhibit 25, contract with Midwest Poultry, is that your signature?</p> <p>A. No, it's not. Gary Stull's.</p> <p>Q. On Exhibit 25?</p> <p>A. Yes.</p> <p>Q. Can I see your copy of 25? Because mine says Thomas J. Klump.</p> <p>MS. LEVIN: I have a different Exhibit 25. That's fine.</p> <p>THE WITNESS: Trick question?</p> <p>BY MS. LEVIN:</p> <p>Q. Look further into the document and see if there's a contract dated February 2007 until</p>	<p style="text-align: center;">160</p> <p>weeks and take 6 cents off of it?</p> <p>A. Correct.</p> <p>Q. And that calculation would be done every week?</p> <p>A. Correct.</p> <p>Q. That's how the rolling market average works?</p> <p>On the second page of Exhibit 18 for Grade A jumbo for Phoenix, Arizona it says "Plus .02 Southcentral Urner Barry Large Market."</p> <p>Can you explain to me how that works.</p> <p>A. Same as the -- it's priced off the south central market instead of the southeast market.</p> <p>Q. Right.</p> <p>A. And it is based off the large market, and there would be a plus 2 cents over the large market.</p> <p>Q. And can you give an explanation for why the Grade A jumbo eggs in Phoenix would be 2 cents above the Urner Barry south central market; whereas the Atlanta, Georgia Grade A jumbo eggs are less than the Urner Barry large market?</p> <p>A. I would love to.</p> <p>The Urner Barry market, the premise behind the Urner Barry market is you have your</p>
<p style="text-align: center;">159</p> <p>April 2008.</p> <p>A. Look further?</p> <p>Q. Can you look further into the document and see if there's another contract. Sometimes there are multiple contracts stapled together.</p> <p>A. That would be a no.</p> <p>Q. No? Okay.</p> <p>So taking a look at Exhibit 18 just for an example, I'd like to walk through a couple of the pricing provisions, okay?</p> <p>A. Okay.</p> <p>Q. You've described for us the Urner Barry market. And I'd just like to make sure I understand, for purposes of this Exhibit 18, under Grade A Jumbo, it's priced off the Southeast Urner Barry Large Market; and then prior to Southeast Urner Barry Market there's .06 inside some little symbols. What does that refer to?</p> <p>A. Well, Grade A jumbo symbols denote a negative, are going to be priced 6 cents behind the southeast Urner Barry large market.</p> <p>Q. So whatever the southeast Urner Barry large market calculation was -- and I believe this was a rolling market average -- you would do the rolling market average for the last preceding four</p>	<p style="text-align: center;">161</p> <p>grain-producing states in the Midwest; Iowa, Indiana, Ohio. The further you go away from the grain-producing states, the higher the change in your differential.</p> <p>Okay? The south central and the southeast market are supposed to take in account for that. The hotter the climate, the harder it is to get jumbo eggs, because chickens are no different than any other farm animal. When it gets hot, they quit eating, and it's real hard to get a hen in Arizona to eat enough grain to produce a jumbo egg. Therefore, you're paying a premium in the hotter climates, the more grain-deficit climates, to get your flock to produce a jumbo egg.</p> <p>Q. The contract also talks about the pricing -- this is on Page 3 of Exhibit 18 -- talks about "The above pricing included packaging material purchased from the Kroger Company."</p> <p>A. Yes.</p> <p>Q. Can you explain what that's referring to.</p> <p>A. Yes. I will.</p> <p>Q. Would you.</p> <p>A. The -- we negotiate with Dolco -- Dolco is the foam producer. Pactiv is the pulp producer.</p>

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<p style="text-align: center;">162</p> <p>1 International Paper or Green Bay Packaging, which is 2 the shippers that -- well, they're the producer that 3 make the shipper that the eggs go in. 4 Q. The carton? 5 A. No. Those are the actual shippers. The 6 big box. The cartons are made by Pactiv and Dolco. 7 We negotiate with them a corporate price; and then 8 the egg producers purchase at our price from those 9 companies. 10 Q. So the cost of the packaging is set 11 forth here in the contract? 12 A. Yes. 13 Q. The price that basically Rose Acre is 14 going to pay to Kroger to purchase the packaging; 15 but that is just incorporated into Rose Acres' 16 price? 17 A. During the term of the contract, if it 18 changes, then we reflect that in the differential. 19 What we want to try to achieve is that 20 when a producer gives us a bid -- I mean, if you're 21 going to give a bid for a three-year contract and 22 you think there's going to be an escalation in paper 23 pulp costs or whatever, you're going to hedge it in 24 your contract. 25 We don't want them to hedge it. We want</p>	<p style="text-align: center;">164</p> <p>1 Q. That's the contract we've been looking 2 at. 3 A. Okay. Basically it's a delivered cost 4 to the warehouse. 5 Q. So it includes the cost of 6 transportation? 7 A. Yes. 8 Q. And you don't know what portion of the 9 price in Exhibit 18 is attributable to 10 transportation? 11 A. No, I do not. 12 Q. But it would mean, for example, that 13 within a given region, the producers that will be 14 most competitive are likely those that are -- have 15 farms based in that region? 16 MR. MURRAY: Objection; calls for 17 speculation. 18 You can answer. 19 THE WITNESS: That's an assumption. 20 BY MS. LEVIN: 21 Q. Are there any discounts given to Kroger 22 under the contract that's in Exhibit 18? 23 A. If there's a discount, it would be on 24 payment. If there's a -- payment terms, sometimes 25 there's a -- this term is net 20 days from date of</p>
<p style="text-align: center;">163</p> <p>1 to go net net. And if there is a change, then we'll 2 reflect it in the business. 3 Q. So you want the packaging not to be a 4 driver of pricing; you want it to be cost neutral? 5 A. Correct. 6 Q. And you simply pass through your cost 7 for purchasing the packaging to the egg producer? 8 A. Yes. 9 Q. Are you able to get better pricing on 10 packaging through bulk purchasing? 11 A. We are the largest carton buyer in the 12 US. 13 Q. So I would imagine that likely enables 14 you to achieve a lower price than others, perhaps? 15 A. I'm not sure what the others get. I 16 would hope that if nothing else, it gives us 17 consistency. 18 Through there we price our cartons east 19 and west so when we're putting our bids out, that 20 it's -- it's -- whether Rose Acres is sending them 21 to High County, North Carolina or Guthrie or 22 Winterset, Iowa, they get the same cost. 23 Q. Okay. What else is to be included in 24 the bid price under Exhibit 18? 25 A. Under Exhibit 18?</p>	<p style="text-align: center;">165</p> <p>1 invoice. 2 Sometimes there's a 1 or 2 percent if 3 paid within 10 days, but it's not on this contract. 4 Q. And then where there is a 1 or 2 percent 5 discount for prompt payment, is that reflected on 6 the invoice. 7 A. It's taken on the invoice, yes. 8 Q. So if the invoice is for \$100 and you 9 pay it within 10 days, you only write a check for 10 \$98? 11 A. Yes. 12 Q. Are there any other kinds of incentive 13 programs that any of the shell egg producers offer 14 to Kroger? Promotional discounts of any sort? 15 A. No. The only -- and one thing I tell 16 all our suppliers, if there is a surplus in eggs, if 17 they're bringing on a coop of mediums, take Midwest. 18 Their coops are 500,000 birds, 460 to 500,000 birds. 19 If they're bringing on a new flock, they're going to 20 have a large portion of mediums. 21 I don't know if you know a lot about 22 chickens, but they start by laying peewees and then 23 smalls and mediums, and then they hopefully progress 24 to get them into large, extra-large quickly, because 25 70 to 80 percent of your market buys</p>

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<p style="text-align: center;">166</p> <p>1 large/extra-large.</p> <p>2 But when they're going through that 3 transition period, if they have a surplus of 4 mediums, always extend the offer. If they have a 5 surplus of any size eggs and they want to use them 6 up, then I would like to work with them to purge 7 that volume through our chain to give them the best 8 value and give us the best value as well.</p> <p>9 Q. So when, for example -- has Midwest, for 10 example, taken you up on that offer in the past?</p> <p>11 A. Yes, yes.</p> <p>12 Q. When Midwest takes you up on that offer, 13 is the price that Kroger pays Midwest the price 14 under the Midwest contract in existence at that 15 time?</p> <p>16 A. No.</p> <p>17 Q. What price is paid to Midwest?</p> <p>18 A. Whatever the price is negotiated between 19 Midwest and myself.</p> <p>20 Q. So you just negotiate the best price you 21 could get for those eggs?</p> <p>22 A. Yes. And basically it's predicated on 23 the market price. If Bob can get 60 cents a dozen 24 on the open market for his eggs and you add carton 25 cost of 8 cents and shipper cost of 5 cents and</p>	<p style="text-align: center;">168</p> <p>1 make a profit on the eggs, and a win for the 2 consumer because they get some eggs at, presumably, 3 a discount price?</p> <p>4 A. Correct.</p> <p>5 Q. How often has that happened in your 6 tenure as the egg procurement person for Kroger?</p> <p>7 A. I don't know a definite number.</p> <p>8 Q. Right.</p> <p>9 A. It has happened.</p> <p>10 It happened more when we were in a 11 cost-plus contract with them than it has since we've 12 been off the cost-plus. I don't know if that's 13 because demand is higher or what.</p> <p>14 Q. That could just be a coincidence?</p> <p>15 A. Could be a coincidence. I can't tell 16 you.</p> <p>17 Q. Does this sort of purchase of excess 18 eggs often occur with respect to something other 19 than medium eggs?</p> <p>20 A. Typically not. It has occurred on 21 large, surplus of large because their coolers are 22 filling up, but more than not, it's in the medium.</p> <p>23 Because mediums only sell to 8 to 24 10 percent on the marketplace. I mean, you bring in 25 a large coop of eggs and have that large of --</p>
<p style="text-align: center;">167</p> <p>1 bring it up 13 cents, he may offer me those eggs at 2 80 cents, and I'll run a feature at 10 for 10 3 featuring burnup -- you know, anywhere from 4 500,000 -- you know, 300 to 500,000 dozen to purge 5 his inventory and run a feature in a KMA.</p> <p>6 Q. So if Midwest were to have excess medium 7 eggs, you would buy them at a price that is below 8 the contract price that you may have with Midwest at 9 that point; is that correct?</p> <p>10 A. Correct.</p> <p>11 Q. And you would then run a feature -- 12 because your acquisition cost has been less, you 13 would run a feature to try to sell those eggs?</p> <p>14 A. Right. Help purge those eggs.</p> <p>15 Q. Right. When you say help purge them, 16 what do you mean?</p> <p>17 A. Well, I mean, he's got an overabundance 18 of eggs, and if they go out to the market, they're 19 going to be sold at a discount. We would rather run 20 them through our retail chain and give him the best 21 value possible and give us a chance to offer our 22 customers a value as well.</p> <p>23 Q. Right. So it's a win for Midwest, 24 because they get rid of their excess eggs; and it's 25 a win for Kroger because it has an opportunity to</p>	<p style="text-align: center;">169</p> <p>1 you've got -- they're laying an egg every 26 hours 2 and you've got 500,000 birds giving you an 3 incredible number of mediums for a period of time, 4 you're looking to do something with that product.</p> <p>5 Q. And so the egg producer can't put them 6 in a warehouse and store them like you might be able 7 to do with some kinds of products; correct?</p> <p>8 A. Correct. USDA specifies that they have 9 to be graded within 30 days of lay.</p> <p>10 Q. Do you purchase excess eggs, or have you 11 purchased excess eggs from any of your suppliers 12 other than Midwest?</p> <p>13 A. Yes.</p> <p>14 Q. Which others?</p> <p>15 A. Oakdell.</p> <p>16 Q. And any others?</p> <p>17 A. Tried some with Rose Acres. I don't 18 think we were successful.</p> <p>19 Q. When you say "tried," what do you mean?</p> <p>20 A. Well, they -- they wanted to run a 21 summer thing, but they wanted to be in their 22 daybreak carton.</p> <p>23 And trying to set up a new UPC or 24 case -- UPC through our system is extremely 25 difficult. It came down to it wasn't worth my time</p>

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<p style="text-align: center;">170</p> <p>1 to invest that much time to get it set up to run in 2 the system.</p> <p>3 Q. So it didn't work out for logistical 4 type reason?</p> <p>5 A. Logistical, yes.</p> <p>6 Q. So other than Midwest and Oakdell, are 7 there any other of your suppliers where you've 8 purchased excess eggs?</p> <p>9 A. Not that I'm aware of.</p> <p>10 Q. We got on to that tangent in conjunction 11 with my question about whether shell egg producers 12 ever provided you with any kind of promotional 13 allowance.</p> <p>14 And I'm not sure I ever quite got an 15 answer as to whether they ever provide you with some 16 kind of promotional allowance.</p> <p>17 A. No.</p> <p>18 Q. Any other kinds of discounts that you 19 ever obtain from shell egg producers? We've talked 20 about the prompt pay discount. We've talked about 21 this type of purchasing of excess inventory. 22 Anything else?</p> <p>23 A. No. The only other thing that is on the 24 line of the promotional, we did have a feature fund 25 set up, Gary Stull set it up with producers, to</p>	<p style="text-align: center;">172</p> <p>1 selling under cost?</p> <p>2 A. Yes. It goes back to make the producer 3 whole for the difference between the feature cost 4 and the market cost.</p> <p>5 Q. And who gets the one dollar?</p> <p>6 A. The producer. The producer manages the 7 whole thing, but we don't do that anymore.</p> <p>8 Q. And that was only done when Mr. Stull 9 was the manager of egg procurement?</p> <p>10 A. Correct.</p> <p>11 Q. Why did you stop doing that sort of 12 feature fund?</p> <p>13 A. Because Kroger corporate found out the 14 nasty A word, and they are extremely hard on that 15 kind of a word. Therefore, they discontinued 16 immediately, settled the funds, and cleaned it up.</p> <p>17 Q. I think you have to help me out with 18 what the nasty A word is.</p> <p>19 A. Accrual.</p> <p>20 Q. Why is that a nasty word?</p> <p>21 A. I don't know.</p> <p>22 Q. Just --</p> <p>23 A. I'll never suggest it.</p> <p>24 Q. You learned your lesson the easy way?</p> <p>25 A. Kinda.</p>
<p style="text-align: center;">171</p> <p>1 accrue X amount per dozen to allow KMAs to go back 2 and feature eggs, and the difference in market 3 versus the feature price would come out of the 4 accrual fund.</p> <p>5 Q. Can you explain to me in a little more 6 detail how that works. How does the accrual fund 7 build up?</p> <p>8 A. Basically the supplier takes care of it. 9 It's predicated on a cents-per-dozen basis.</p> <p>10 Q. So let's say it's -- I do better with 11 concrete examples. Let's say it's a penny a dozen, 12 and we're talking about 100 dozen, so you end up 13 with a dollar in the accrual fund.</p> <p>14 A. Correct.</p> <p>15 Q. And that's just a bookkeeping entry, I 16 gather, of some sort, or is there actually a bank 17 account with a dollar in it?</p> <p>18 A. No, it's bookkeeping.</p> <p>19 Q. So you've got one dollar in your accrual 20 fund. What happens next?</p> <p>21 A. Then the KMA wants to sell their large 22 eggs for a penny under cost. So that penny per 23 dozen comes out of the accrual fund.</p> <p>24 Q. And gets credited towards whatever 25 invoice price you have for the eggs that you're</p>	<p style="text-align: center;">173</p> <p>1 Q. If you'll take a look at Exhibit 23, 2 which is the contract at National Foods, and on the 3 second page of Exhibit 23 it makes reference to, 4 underneath the pricing, the Urner Barry pricing 5 chart, the second sentence makes reference to lumper 6 fees?</p> <p>7 A. Correct.</p> <p>8 Q. Can you tell me what a lumper fee is.</p> <p>9 A. A lumper is a person that, at the 10 warehouse, unloads trucks. If it's a third-party 11 warehouse or even a Kroger warehouse, they may 12 charge a producer a fee to unload his truck. If 13 that truck's coming in with eggs and they're stacked 14 six high in the warehouse, could only take him five 15 high to bring them in, six high to maximize the 16 freight, and on the dock they break them down to 17 five high, that's a lumper charge.</p> <p>18 Q. And in this particular National Foods 19 contract, an amount has been added to the bid price 20 to account for the possibility of lumper fees?</p> <p>21 A. It's not the possibility. It is the 22 charge for a lumper fee.</p> <p>23 Q. Okay. There was a certainty that there 24 would be lumper fees of some sort?</p> <p>25 A. Yes.</p>

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<p style="text-align: right;">174</p> <p>1 Q. And also on that second page of 2 Exhibit 23 there's a reference to fixed pricing -- 3 A. Yes. 4 Q. -- for various products? 5 Is that what you were describing 6 earlier, I think you called it flat pricing? 7 A. Yes. 8 Q. But in this context it's called fixed? 9 A. Correct. Synonymous. 10 Q. We're talking about the same thing. 11 The Midwest Poultry contract, which is 12 Exhibit 20, we have different Exhibit 25s. Take a 13 look at Exhibit 25 that you have, and see if, just 14 prior to the end, there is a -- I'm sorry. If 15 anywhere in it there's a paragraph headed "Terms," 16 that gives you a discount for payments made within 17 10 days. 18 A. I don't have that in my contract. 19 Oh, wait, yes, I do have terms. 20 Q. And is there a discount for prompt 21 payment? 22 A. Yes. Kroger will receive a .0025 per 23 dozen discount for payments within 10 days of 24 receipt of invoice. 25 Q. That takes care of those, I believe.</p>	<p style="text-align: right;">176</p> <p>1 another supplier to fulfill a requirement for a 2 period of time. 3 Q. And has that happened on occasion? 4 A. Yes, it has. 5 Q. Can you describe those occasions. 6 A. It happened actually in the Atlanta KMA 7 with Midwest Poultry. I'm trying to think of the 8 circumstances behind it. But they were short on 9 supply, and I sourced eggs from Rose Acres to send 10 them into the Atlanta KMA to backfill the business. 11 Q. Has it happened on any other occasion? 12 A. Not to my recollection. 13 Q. Do you know what the reason was for the 14 shortfall in eggs? 15 A. I knew you were going to ask me that. I 16 do, if I can remember it. 17 I just can't recollect at this time what 18 that was. There was a pretty valid reason. 19 Q. Do you recall whether it was, for 20 example, some sort of disaster at the egg producer's 21 facilities? 22 A. It wasn't due to a disaster. It may 23 have been a heat-related issue. We went through the 24 droughts. And temperatures got really high. We had 25 a high mortality rate with producers because of the</p>
<p style="text-align: right;">175</p> <p>1 As a result of your solicitation of bids 2 through the RFQ process, have you replaced any 3 incumbent shell egg producer with a different shell 4 egg producer? 5 A. Yes. 6 Q. Can you tell me what occasions that's 7 occurred on. 8 A. It occurred on two occasions. Midwest 9 Poultry picked up the Atlantic KMA. 10 Q. And that was from Rose Acre? 11 A. That was from Rose Acres. 12 This last contract, NuCal picked up the 13 Smith's southwest business from Moark. 14 Q. And why was that change made? 15 A. The Rose Acres was changed due to 16 quality of the product being delivered; the NuCal 17 picked up the business due to price. 18 Q. Other than what you described in terms 19 of purchasing excess product from Midwest, does 20 Kroger do any sort of spot purchasing of shell eggs? 21 A. No. 22 Q. All of the purchasing is done under 23 contract? 24 A. Yes. The only exception would be if a 25 supplier was short, and I had to reach out to</p>	<p style="text-align: right;">177</p> <p>1 high heat. We were losing a large amount of birds 2 due to heat stress. 3 Q. So your recollection is it was a supply 4 problem rather than a surged in demand, for 5 instance? 6 A. Yes. 7 Q. Or a miscalculation of what kind of 8 supply would be necessary? 9 A. I wouldn't say it was a miscalculation. 10 I think it was more a physical event that created 11 the shortage; not limited to a producer, but limited 12 to the industry. 13 Q. Are all of Krogers' shell egg contracts 14 during your tenure what I would call requirements 15 contracts? Meaning that the producer is required to 16 supply all of Krogers' requirements for a particular 17 region. 18 A. Yes. 19 Q. How do you go about informing the 20 producer of what quantity of eggs are required? 21 A. We give them an estimation on the RFQ 22 what the volumes are. 23 Q. And is the estimation -- what kind of 24 time frame does the estimation -- 25 A. It's a yearly estimation.</p>

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<p style="text-align: center;">178</p> <p>1 Q. Does the estimation include anything 2 about seasonal demand, for instance?</p> <p>3 A. No.</p> <p>4 Q. So the estimation is simply we will need 5 300 dozen eggs this year, for instance?</p> <p>6 A. And we don't bid the business on volume. 7 We bid the business on price.</p> <p>8 Q. What do you mean, we don't bid it on 9 volume?</p> <p>10 A. Well, we're not telling you, if you're 11 the egg producer, we're going to buy 300 million 12 dozen from you this year. We say, we're going to -- 13 we will buy the total volume for this KMA from you 14 for this price.</p> <p>15 Q. But this is what we estimate that volume 16 will be?</p> <p>17 A. This is what our estimate, as of last 18 year, is.</p> <p>19 Q. And you're not required to purchase that 20 volume from that particular producer?</p> <p>21 A. Correct. Your egg producers are very, 22 very astute. They know what their volumes are and 23 what they need to produce.</p> <p>24 Q. So they're able to adjust their 25 production in accordance with projected demand?</p>	<p style="text-align: center;">180</p> <p>1 there were discussions.</p> <p>2 Q. Can you tell me generally what the gist 3 of the discussions were?</p> <p>4 A. I'm sure the gist of the discussions 5 were about the reasons why we were moving away from 6 cost-plus to a market-based system.</p> <p>7 Q. Did Mr. Krouse encourage you to continue 8 a cost-plus approach with Midwest?</p> <p>9 A. I don't want to say he encouraged me. 10 He was disappointed that we were moving away from 11 it.</p> <p>12 Q. Did he propose alternatives to the 13 four-week rolling average Urner Barry metric that 14 you wanted to move to?</p> <p>15 A. We were working on different metrics on 16 the cost-plus to try to save the program; and we 17 just didn't work fast enough.</p> <p>18 Q. What do you mean "we didn't work fast 19 enough"?</p> <p>20 A. Well, we didn't get it in front of the 21 right people to implement it before they canceled 22 the program.</p> <p>23 Q. So you were amenable to some sort of 24 continued cost-plus approach with Midwest?</p> <p>25 A. Yes.</p>
<p style="text-align: center;">179</p> <p>1 A. Yes.</p> <p>2 Q. Or at least they try?</p> <p>3 A. They try.</p> <p>4 Q. And that's to their benefit, because if 5 they produce too many eggs, the price will go down?</p> <p>6 MR. MURRAY: Object to the form of the 7 question; calls for speculation.</p> <p>8 THE WITNESS: Possibly.</p> <p>9 BY MS. LEVIN:</p> <p>10 Q. I think you testified earlier that 11 supply and demand are important factors in pricing; 12 correct?</p> <p>13 A. Correct.</p> <p>14 Q. And if there's excess supply, all things 15 being equal, the price goes down?</p> <p>16 A. Given the way you stated that; correct. 17 All things being equal.</p> <p>18 Q. All things being equal. I understand 19 that there's a lot in those little words.</p> <p>20 Did you have any discussions with 21 Mr. Krouse and there was a move away from cost-plus 22 pricing with Midwest?</p> <p>23 A. Yes.</p> <p>24 Q. What were those discussions?</p> <p>25 A. Exact discussions I can't recall. But</p>	<p style="text-align: center;">181</p> <p>1 Q. But there were other people within 2 Kroger who needed to sign off on that; is that 3 correct?</p> <p>4 A. True.</p> <p>5 Q. And who were those people?</p> <p>6 A. Don Becker would the first one, and he'd 7 probably be the most important -- Alan Faust.</p> <p>8 Q. And you think if you could have gotten 9 that proposal to him in time for him to consider it 10 more thoroughly, perhaps it would have been approved 11 by him?</p> <p>12 MR. MURRAY: Objection; calls for 13 speculation.</p> <p>14 You can answer if you know, but --</p> <p>15 THE WITNESS: Yes. My belief is that --</p> <p>16 BY MS. LEVIN:</p> <p>17 Q. Right.</p> <p>18 A. -- we could have.</p> <p>19 MR. MURRAY: That's his personal belief, 20 not Krogers'.</p> <p>21 MS. LEVIN: Oh, I understand.</p> <p>22 THE WITNESS: That's my personal belief.</p> <p>23 MS. LEVIN: But his testimony was we 24 just didn't get it in front of the right people fast 25 enough so...</p>

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<p style="text-align: center;">182</p> <p>1 THE WITNESS: Correct. 2 MS. LEVIN: So he clearly had some sort 3 of view on the subject. 4 BY MS. LEVIN: 5 Q. And the cost program that you discussed 6 with Mr. Krouse and that you were amenable to was 7 what? How did that look? 8 A. It was a hybrid cost-plus program. 9 Q. And what is a hybrid cost-plus program? 10 A. Well, it's the basic cost-plus, but it 11 would take the seasonal changes in the market into 12 consideration. 13 That would give us a higher than 14 cost-plus pricing through the high-cost periods; and 15 a decrease in the time when the market typically 16 went down. 17 Q. So it would again smooth out some of 18 those peaks and valleys that were in the egg price 19 volatility chart we looked at? 20 A. Well, there wouldn't be any peaks and 21 valleys because it's cost-plus. But it would take 22 into account the difference in the seasonal demand 23 through the holidays versus the lulls through the 24 summer. 25 Q. You mentioned that Mr. Becker needed to</p>	<p style="text-align: center;">184</p> <p>1 ever any discussion about manipulation of pricing by 2 the shell egg producers? 3 A. I don't think I understand what you're 4 asking. 5 Q. Do you recall there being any discussion 6 by -- with Mr. Krouse that people within Kroger 7 thought that there was manipulation with respect to 8 shell egg pricing? 9 A. For what time period? 10 Q. Any time period. 11 A. Yes. 12 Q. What do you recall about that 13 conversation? 14 A. Well, after we went off the cost-plus 15 pricing, went to market-based pricing, UEP formed US 16 Exporters, and the exports in one year doubled. And 17 I got a call from Bob Krouse stating that we were 18 rolling into -- our main concern on supply was 19 always through the peak times, because our demand 20 would increase. 21 I got a call from Bob Krouse, said that 22 we might experience some shortages through 23 Thanksgiving, which is our highest-volume time, and 24 that the UEP had another export lined up. 25 And I told Mr. Krouse that if the UEP</p>
<p style="text-align: center;">183</p> <p>1 sign off on the continued cost-plus pricing with 2 Midwest; is that correct? 3 A. He didn't sign off on anything. He 4 dictated. 5 Q. I see. But in terms of -- but in terms 6 of just awarding the contracts that we looked at for 7 Exhibits 18 through 25 where there was a straight 8 Urner Barry-type pricing method, you were the one 9 who decided to whom to award those contracts; 10 correct? 11 A. Yes. 12 Q. And you didn't need to get Mr. Becker's 13 approval for those contracts or for any of the 14 prices contained in them? 15 A. Correct. 16 Q. It was only if you wanted to go outside 17 the Urner Barry rolling average approach that you 18 needed Mr. Becker's sign-off? 19 A. Blessing. 20 Q. Blessing, whatever. 21 A. Thank you. 22 Q. Blessing is fine. 23 In the course of your conversations with 24 Mr. Krouse about whether there was some way to 25 continue to use the cost-plus approach, was there</p>	<p style="text-align: center;">185</p> <p>1 continued to export eggs and short the retail 2 market, which is the main thrust of their business, 3 that I would see that every supplier that was 4 currently supplying Kroger wouldn't be a supplier in 5 the future. 6 Q. So you were of a view, in 2007, that 7 exports were causing a shortage in the domestic 8 supply of shell eggs? 9 A. Export did create a shortage in the 10 supply of eggs; and they did raise the cost. 11 Q. And the exports did cause the domestic 12 price to increase? 13 A. Absolutely. 14 Q. When did you become aware of this effect 15 of exports on the domestic price? 16 A. Well, I had been tracking it all year 17 through the different metrics, watching the exports, 18 and it came to a head when I got the call that there 19 was going to be another export through the 20 high-volume time of the season, and that it was 21 going to create a market shortage. Actually, a 22 market shortage at retail. 23 Q. When you say you had been following it 24 throughout the year, what year are you talking 25 about?</p>

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<p style="text-align: right;">186</p> <p>A. 2007.</p> <p>Q. When in 2007 did you start to track exports and the effect on prices?</p> <p>A. Probably midsummer. When I realized what was going on.</p> <p>MR. MURRAY: If you're moving to another document, let's take a break. We've been going for over an hour now.</p> <p>MS. LEVIN: Okay.</p> <p>THE VIDEOGRAPHER: We are going off the record. This time on video is 14:34.</p> <p>(Recess taken.)</p> <p>THE VIDEOGRAPHER: We are going back on the record. Time on video is 14:43.</p> <p>BY MS. LEVIN:</p> <p>Q. Okay, Mr. Klump. We were talking about exports and the impact on egg pricing. And I just wanted to see if you could pin down exactly when it was that you started following the export price in relation to your conversation with Mr. -- not the export price, the fact of exports at the time when you had your conversation with Mr. Stull about -- not with Mr. Stull -- with Mr. Krouse about your suspicion of manipulation by the shell egg industry.</p> <p>A. I didn't say there was any suspicion of</p>	<p style="text-align: right;">188</p> <p>court reporter read back a couple of Q and As there.</p> <p>MS. CRABTREE: That would be perfect, thank you.</p> <p>(Record read.)</p> <p>BY MS. LEVIN:</p> <p>Q. And did you suspect, at the time that you learned about exports, that it was -- the exports were having an effect on price?</p> <p>MR. MURRAY: Objection to the form of the question.</p> <p>You can answer if you can.</p> <p>THE WITNESS: Yes.</p> <p>BY MS. LEVIN:</p> <p>Q. So you had that suspicion. And do you know when it was that you started following exports by USEM?</p> <p>A. I started receiving calls from Midwest informing me about the exports is when I started noticing them.</p> <p>Q. And do you know when that took place?</p> <p>A. No. Like I said, it was probably in the summer sometime.</p> <p>Q. In the summer of what year?</p> <p>A. '07, if I've got the year right.</p> <p>Q. Conversation could have been the summer</p>
<p style="text-align: right;">187</p> <p>manipulation. I was just noticing there was more exports.</p> <p>Q. You were noticing more exports, and you were noticing that that was causing an effect on pricing; correct?</p> <p>A. No; I noticed that it was causing an effect on supply.</p> <p>Q. And was it also causing an effect on pricing?</p> <p>A. That's an assumption.</p> <p>Q. You don't know one way or the other whether exports had an effect on pricing?</p> <p>A. Basically you're assuming that it does, and I would be assuming that it would too. I don't know.</p> <p>Q. Well, do you know whether a decrease in supply has an effect on prices?</p> <p>A. Yes, it does.</p> <p>MS. LEVIN: Sorry, we started asking a couple questions. We forgot you guys were there, so you've missed a little bit.</p> <p>MS. CRABTREE: Can you explain to me the basic subjects of those? I don't know if you can do that actually, but...</p> <p>MS. LEVIN: Maybe we could just have the</p>	<p style="text-align: right;">189</p> <p>of 2006?</p> <p>A. I don't think so because we were on cost-plus pricing in 2006.</p> <p>MS. LEVIN: Well, let's mark as Exhibit 45 a document bearing Bates No. KRGEGED00018589.</p> <p>(Kroger Exhibit 45 was marked for identification.)</p> <p>(Pause.)</p> <p>THE WITNESS: Okay.</p> <p>BY MS. LEVIN:</p> <p>Q. Have you had a chance to review --</p> <p>A. Yes, I have.</p> <p>Q. -- Exhibit 45?</p> <p>What is Exhibit 45?</p> <p>A. 45 is a letter from Bob Krouse to myself. It talks about concerns about current egg market volatility in the shell egg market as a result of industry manipulation.</p> <p>Q. And the date of Exhibit 45 is February 15th, 2007; correct?</p> <p>A. Correct.</p> <p>Q. Does this refresh that it was in the summer of 2006 that you started to track the exports by USEM?</p>

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<p style="text-align: right;">190</p> <p>A. No.</p> <p>Q. Well, does it refresh your recollection that that occurred before the summer of 2007?</p> <p>A. Well, this doesn't talk about exports.</p> <p>Q. I understand that it doesn't talk about exports.</p> <p>Did you have more than one suspicion of industry manipulation of egg prices?</p> <p>MR. MURRAY: Object to the form of the question. Mischaracterizes prior testimony.</p> <p>THE WITNESS: Not to my knowledge.</p> <p>BY MS. LEVIN:</p> <p>Q. Well, tell me what the reference is in the first sentence to industry manipulation.</p> <p>A. Restate your question.</p> <p>MS. LEVIN: Can you read it back, please.</p> <p>(Record read.)</p> <p>MR. MURRAY: Object to the form of the question.</p> <p>THE WITNESS: I don't know. It just states that it's a concern -- it concerns me that Kroger feels "the current volatility in the shell egg market is a result of industry manipulation."</p> <p>BY MS. LEVIN:</p>	<p style="text-align: right;">192</p> <p>testimony that may have been or may be given about what these conversations consisted of?</p> <p>MR. MURRAY: Objection to the form of the question, calls for speculation.</p> <p>BY MS. LEVIN:</p> <p>Q. You don't recall them; right?</p> <p>A. I don't recall them.</p> <p>Q. So you wouldn't be able to contradict what someone else said about them?</p> <p>A. Correct.</p> <p>MR. MURRAY: Same objection.</p> <p>BY MS. LEVIN:</p> <p>Q. You don't recall Mr. Krouse assuring you that control is well beyond the ability of the shell egg industry?</p> <p>A. I do not.</p> <p>Q. Do you recall any concern, in 2007, about pricing volatility with respect to shell eggs?</p> <p>A. Pricing volatility is always a concern.</p> <p>That's why we were tracking the volatility of the egg market.</p> <p>Q. And the volatility that you're referring to is the up and down in the Urner Barry price?</p> <p>A. Correct.</p> <p>Q. Do you recall any conversations with</p>
<p style="text-align: right;">191</p> <p>Q. Correct. And do you recall a conversation with Mr. Krouse sometime prior to February 2007 in which you told him that "some at Kroger feel the current volatility in the shell egg market is the result of industry manipulation"?</p> <p>A. No, I do not.</p> <p>Q. Do you deny that you had such conversations with Mr. Krouse?</p> <p>MR. MURRAY: Object to the form of the question. Asked and answered.</p> <p>THE WITNESS: Do not know.</p> <p>BY MS. LEVIN:</p> <p>Q. So if Mr. Krouse were to have testified differently, you couldn't contradict that testimony?</p> <p>MR. MURRAY: Object to the form of the question. Calls for speculation.</p> <p>THE WITNESS: Correct.</p> <p>BY MS. LEVIN:</p> <p>Q. Do you recall receiving Exhibit 45?</p> <p>A. No, I do not.</p> <p>Q. Do you recall anything at all about the conversations you've had with Mr. Krouse on the subject of industry manipulation?</p> <p>A. No, I do not.</p> <p>Q. So you're unable to contradict any</p>	<p style="text-align: right;">193</p> <p>Mr. Krouse about whether cost-plus pricing was a way to avoid volatility?</p> <p>A. Cost-plus pricing is a way to avoid volatility.</p> <p>Q. And do you recall discussions with Mr. Krouse about that?</p> <p>A. I have had discussions with Bob Krouse on the benefits of cost-plus pricing.</p> <p>Q. Can you tell me what those conversations were.</p> <p>A. Just pretty much what we've said in the past: It's a way to -- it's a true cost system that reflects -- that's not predicated on market volatility.</p> <p>Q. Mr. Krouse states, at the end of his email to you [reading]: What we are seeing in the market now is nothing new, just a continuation of a long-term trend.</p> <p>What did you understand him to be saying in that sentence?</p> <p>A. Is you had seen in my presentation, the egg volatility chart -- and that would be the reference I would make there.</p> <p>Q. So that pricing volatility has been present in the shell egg market for a number of</p>

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<p>194</p> <p>1 years?</p> <p>2 A. Yes.</p> <p>3 Q. And you agree with that observation?</p> <p>4 A. Yes.</p> <p>5 Q. What brings about the volatility?</p> <p>6 MR. MURRAY: Objection; lack of</p> <p>7 foundation, calls for speculation.</p> <p>8 THE WITNESS: A lot of different</p> <p>9 factors.</p> <p>10 BY MS. LEVIN:</p> <p>11 Q. Such as?</p> <p>12 A. Feed cost, exports, consumer demand, dietary changes.</p> <p>13 Q. Anything else?</p> <p>14 A. Even a report by the Surgeon General on cholesterol and eggs could affect the egg volatility. Any positive and negative report that has eggs in it will affect eggs.</p> <p>15 Q. Do you know when USEM began exporting</p> <p>16 eggs from the United States?</p> <p>17 A. I do not.</p> <p>18 Q. Do you know whether pricing volatility</p> <p>19 existed prior to any exports by US --</p> <p>20 A. I do not because I don't know when they started exporting eggs.</p>	<p>196</p> <p>1 Midwest during that time period, the summer of</p> <p>2 2007 -- from Midwest at a price below its contract</p> <p>3 price with Midwest?</p> <p>4 MR. MURRAY: Object to the form of the</p> <p>5 question.</p> <p>6 THE WITNESS: I can't state for certain</p> <p>7 that was below. I would assume -- maybe I shouldn't</p> <p>8 assume, if he offered that price, then it would have</p> <p>9 been below our current market price.</p> <p>10 BY MS. LEVIN:</p> <p>11 Q. So in the summer of 2007, Kroger was</p> <p>12 able to obtain prices -- obtain excess eggs at a</p> <p>13 below-market price from Midwest?</p> <p>14 MR. MURRAY: Objection; mischaracterizes</p> <p>15 his testimony.</p> <p>16 BY MS. LEVIN:</p> <p>17 Q. Is that correct?</p> <p>18 A. One thing that we did as well is he would offer at a set price, so we'd run the feature not knowing what the market would be at that time.</p> <p>19 Q. And what is happening, what's being</p> <p>20 reported in this particular email?</p> <p>21 A. Just that. This says [reading]: As we discussed yesterday, MPS will have a surplus of</p> <p>22 mediums during the last week of September, first</p>
<p>195</p> <p>1 Q. But you first noticed the effect of</p> <p>2 exports in, you say, 2007?</p> <p>3 A. Yes.</p> <p>4 Q. And you believe that was the summer of</p> <p>5 2007?</p> <p>6 A. Summer/fall, somewhere in there.</p> <p>7 MS. LEVIN: Let's mark as Exhibit 46 a</p> <p>8 document bearing Bates No. KRGEGED00018496.</p> <p>9 (Kroger Exhibit 46 was marked for</p> <p>10 identification.)</p> <p>11 BY MS. LEVIN:</p> <p>12 Q. What is Exhibit 46?</p> <p>13 A. Exhibit 46 is what we talked about prior with Midwest Poultry having a surplus of mediums and offering them to Kroger at a discount.</p> <p>14 Q. So in the summer of 2007, this is when</p> <p>15 you state you were starting to notice the effect of</p> <p>16 exports; correct?</p> <p>17 A. Yes.</p> <p>18 Q. And yet at this same time, Midwest was</p> <p>19 providing you with a surplus of eggs for September</p> <p>20 and October; correct?</p> <p>21 A. Yes.</p> <p>22 Q. So whatever the effect of exports on the</p> <p>23 market, Kroger was able to obtain surplus eggs from</p>	<p>197</p> <p>1 week of October, weeks 2 and 3 of Kroger period</p> <p>2 nine. If Kroger is interested, we can provide them</p> <p>3 with a million dozen eggs, 42,000, 24 dozen cases at</p> <p>4 a fixed cost of .69.</p> <p>5 Q. All right.</p> <p>6 A. And this is dated August 9th. So he's looking ahead, saying if you'll run this feature, I'll guarantee the cost can be 69 cents, not knowing what the market's going to be during that time period, to get us to buy into the feature and go ahead and run it.</p> <p>7 Q. But the price that you were obtaining</p> <p>8 those eggs at was below your contract price with</p> <p>9 Midwest; correct?</p> <p>10 A. You don't know what your contract price is yet. You're talking August, and we still got</p> <p>11 August and September, all the way to October to find</p> <p>12 out what the Urner Barry price is going to be. And</p> <p>13 based on the volatility of the market, you don't</p> <p>14 know what that price is going to be.</p> <p>15 So what he's saying is, we'll guarantee</p> <p>16 them at 69 cents if you can run a feature and put</p> <p>17 the feature together.</p> <p>18 Q. And when you say you don't know what the</p> <p>19 price is going to be two months down the road,</p>

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<p style="text-align: center;">198</p> <p>1 that's because you don't know what the Urner Barry 2 index is going to do; correct?</p> <p>3 A. Correct.</p> <p>4 Q. So anytime you make a decision to sell 5 somebody eggs two months down the road, you don't 6 know whether -- and you're making that for a fixed 7 price as of that date, as of August 9th, 2007, you 8 don't know whether that price ultimately is going to 9 be above or below market price at the time the sale 10 is actually consummated?</p> <p>11 A. True.</p> <p>12 Q. At the time of August 2007, at the time 13 of this email, was 69 cents a dozen below the 14 existing market price?</p> <p>15 A. I do not know.</p> <p>16 Q. Is there some sort of record you could 17 look at to determine that?</p> <p>18 A. We can look at pricing records, yes.</p> <p>19 Q. Would it made been a difference to you 20 whether the 69-cent fixed price was below market 21 price as of August 2007?</p> <p>22 A. Restate that question again.</p> <p>23 Q. Would you have been interested in 24 Mr. Krouse's offer if the fixed price of 69 cents 25 was above the current market price?</p>	<p style="text-align: center;">200</p> <p>1 Q. But again, the decision about whether to 2 do this deal is made in August of 2007, at which 3 point you really don't know what the market price is 4 going to be two months from now?</p> <p>5 A. You're estimating what the market will 6 be.</p> <p>7 Q. Mr. Krouse says in the last sentence, 8 "If the Urner Barry market is lower than we project, 9 the same quantity of mediums will be available to 10 Kroger at their regular price."</p> <p>11 What is he referring to there?</p> <p>12 A. Just what it states.</p> <p>13 Q. Well, can you explain that in a little 14 more concrete terms.</p> <p>15 A. Well, if we lock the feature in at 16 69 cents --</p> <p>17 Q. In August?</p> <p>18 A. In August -- and the Urner Barry only 19 goes to 63 cents, Kroger will still exercise the 20 feature to use the volume, and we'll pay whatever 21 the current market price is.</p> <p>22 Q. So if it's 63 cents, you'll pay 23 63 cents?</p> <p>24 A. Correct.</p> <p>25 Q. What is the reference to Krogers'</p>
<p style="text-align: center;">199</p> <p>1 A. Yes, if I had the expectation that it 2 was going to start increasing to that period. 3 Because you got to remember, we're getting into the 4 holiday period; we're projecting where we think the 5 market will be, we can lock the feature in at 6 69 cents.</p> <p>7 I can tell the KMAs they've got this 8 volume of eggs at this price. They'll go ahead and 9 set the feature.</p> <p>10 The biggest thing that kills a feature 11 is anticipating what the market is going to be and 12 have the market be something different than what the 13 anticipation is and then they pull the feature.</p> <p>14 Q. So if the market price between August 15 and October, when these eggs were actually going to 16 fit your warehouse, if the market price in that time 17 period dropped, would you still purchase the eggs?</p> <p>18 A. Probably -- that has happened. What Bob 19 does is come back and renegotiate an offer at a 20 lower cost.</p> <p>21 Q. So that you can still run your feature?</p> <p>22 A. Yes. If the market does not achieve 23 that price point, typically he'll come back and say 24 Hey, we'll keep the feature on, let's make it 25 65 cents a dozen.</p>	<p style="text-align: center;">201</p> <p>1 regular price?</p> <p>2 A. Contracted price.</p> <p>3 MS. LEVIN: Let's take a look at a 4 document bearing Bates No. KRGEGED00015734. And it 5 is being marked as Exhibit 47.</p> <p>6 (Kroger Exhibit 47 was marked for 7 identification.)</p> <p>8 (Pause.)</p> <p>9 BY MS. LEVIN:</p> <p>10 Q. Have you had a chance to review 11 Exhibit 47?</p> <p>12 A. I have.</p> <p>13 Q. What is Exhibit 47?</p> <p>14 A. Exhibit 47 is when we moved to the 15 four-week rolling average from cost-plus.</p> <p>16 Q. When does period one, 2006, begin?</p> <p>17 A. February.</p> <p>18 Q. So period one of every year begins 19 February 1st?</p> <p>20 A. Well, whatever the first full week in 21 February is.</p> <p>22 Q. What -- okay. Whatever the first full 23 week.</p> <p>24 And the reference in the first sentence 25 to [reading]: We have been through egg markets in</p>

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<p style="text-align: center;">202</p> <p>1 the past two years that have reached unprecedented 2 highs and lows, is the volatility that you've been 3 talking about?</p> <p>A. Yes.</p> <p>5 Q. And the -- do you know who prepared this 6 document, Exhibit 47?</p> <p>A. I do not.</p> <p>8 Q. But it was copied to you; is that 9 correct?</p> <p>A. That's correct.</p> <p>11 Q. Do you know whether it was, in fact, 12 sent to Mr. Koschwitz, Flaherty and Clark?</p> <p>A. I'm sure if their name's on the letterhead, it was.</p> <p>15 Q. And the second sentence you reference -- 16 is referenced that "Most recently we implemented a 17 new retail pricing strategy."</p> <p>18 And that's the pricing strategy you've 19 been discussing about going to the rolling average 20 for Urner Barry?</p> <p>A. It could be a pricing strategy as that or at retail.</p> <p>23 Q. It may be a reference to a new retail pricing strategy?</p> <p>A. Yes.</p>	<p style="text-align: center;">204</p> <p>1 retailer.</p> <p>2 Q. Because if they can sell the surplus 3 eggs to Kroger, it will be at a higher price than 4 they can sell them as a breaker?</p> <p>A. Yes.</p> <p>6 Q. But the price to Kroger, nonetheless, 7 would be below the contract price that Kroger might 8 have with that particular producer?</p> <p>A. Correct.</p> <p>10 Q. Do you know whether Kroger purchased 11 excess eggs from Rose Acre Farms during 2006 --</p> <p>A. We did not.</p> <p>13 Q. -- pursuant to this particular type of 14 program?</p> <p>A. We did not.</p> <p>16 Q. And did Kroger purchase eggs from any of 17 its suppliers during 2006 in this sort of surplus 18 situation?</p> <p>A. I would say for Midwest Poultry, yes.</p> <p>From Rose Acres, no; and I don't remember about Oakdell.</p> <p>22 Q. How would we tell from transaction data 23 the purchases that are of surplus eggs at a 24 decreased price? Just by the pricing in the 25 transaction data?</p>
<p style="text-align: center;">203</p> <p>1 Q. In the next-to-last paragraph it talks 2 about "Your egg supplier is Rose Acre Farms." 3 [Reading]: They have been asked to keep us in mind 4 first in the event that they have a surplus of eggs. 5 Do you see that?</p> <p>A. Yes, I do.</p> <p>7 Q. And then it says, "These types of 8 situations can give us an opportunity for a reduced 9 cost because we're taking eggs that would normally 10 be sold off to a breaker for a reduced margin." 11 Do you see that?</p> <p>A. Yes, I do.</p> <p>13 Q. Is that again a reference to what you've 14 been talking about where Kroger might purchase 15 excess eggs or surplus eggs from some of their 16 producers?</p> <p>A. It is.</p> <p>18 Q. And the reference here is to an 19 opportunity for a reduced cost. 20 What is that referring to?</p> <p>A. Well, just what it says. It's being able to source eggs that the producer would sell on the breaker side of the market at a deep discount or sell them through our Kroger KMA's at a higher cost, which is a win-win to the producer and to the</p>	<p style="text-align: center;">205</p> <p>1 A. Yes.</p> <p>2 MS. LEVIN: Let's mark as Exhibit 48 a 3 document bearing Bates No. KRGEGED00015785. 4 (Kroger Exhibit 48 was marked for 5 identification.) 6 (Pause.) 7 BY MS. LEVIN: 8 Q. What is Exhibit 48, Mr. Klump? 9 A. Exhibit 48 seems to be a communication between the category management team and the KMA's on a pricing structure change. 12 Q. And you received a copy of Exhibit 48; 13 correct? 14 A. I did. 15 Q. Based on the sentence, "Starting in 16 Period 1, 2007, we will change to weekly pricing on 17 all banner brand eggs," would you say that this memo 18 has to have been prepared sometime prior to 19 February 2007? 20 MR. MURRAY: Objection to the form of 21 the question. Calls for speculation. 22 You can answer if you know. 23 THE WITNESS: Yes. 24 BY MS. LEVIN: 25 Q. And in the third sentence of</p>

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<p style="text-align: center;">206</p> <p>1 Exhibit 48 -- third paragraph of 48, there's a 2 reference to "a 300-container export set up by 3 United Egg Producers which has created a shortage of 4 eggs in the market."</p> <p>5 Do you see that?</p> <p>6 A. Yes, I do.</p> <p>7 Q. Does this refresh your recollection 8 about when you became aware of exports by United Egg 9 Producers?</p> <p>10 A. I'm not sure if this is in reference to 11 the same time or not. There's multiple loads that 12 went out.</p> <p>13 Q. I understand that there's multiple 14 loads. But you talked about not learning about that 15 until the summer of 2007. And I'm asking you if 16 this refreshes your recollection that it was earlier 17 than the summer of 2007 that you learned about those 18 exports.</p> <p>19 MR. MURRAY: Objection; mischaracterizes 20 his testimony.</p> <p>21 THE WITNESS: I don't know.</p> <p>22 BY MS. LEVIN:</p> <p>23 Q. It doesn't refresh your recollection?</p> <p>24 A. No, it does not.</p> <p>25 Q. But as of sometime prior to February of</p>	<p style="text-align: center;">208</p> <p>1 MR. MURRAY: Objection. Asked and 2 answered, mischaracterizes the testimony.</p> <p>3 MS. LEVIN: I haven't characterized his 4 testimony at all. That's a crazy objection.</p> <p>5 THE WITNESS: There was over 1800 6 different exports, or 1800 containers that went out. 7 We're talking about one block, I mean.</p> <p>8 BY MS. LEVIN:</p> <p>9 Q. And do you know when it was that you 10 first learned about those exports?</p> <p>11 A. No, I do not.</p> <p>12 Q. So it could have been in the summer of 13 2006; correct?</p> <p>14 MR. MURRAY: Objection; calls for 15 speculation.</p> <p>16 THE WITNESS: That's assumption.</p> <p>17 BY MS. LEVIN:</p> <p>18 Q. Well, at a minimum you knew it by the -- 19 February 2007?</p> <p>20 A. This memo talks about a 300-container 21 export.</p> <p>22 Q. Right. And you received this memo?</p> <p>23 A. Yes.</p> <p>24 Q. So the testimony that you didn't learn 25 about these exports until the summer of 2007 was</p>
<p style="text-align: center;">207</p> <p>1 2007, you received a memo talking about exports of 2 eggs; correct?</p> <p>3 A. Yes.</p> <p>4 Q. And about those exports creating a 5 shortage of eggs in the market; correct?</p> <p>6 A. Yes.</p> <p>7 Q. But that doesn't refresh your 8 recollection that you started tracking that 9 information in 2006 rather than 2007?</p> <p>10 A. No, it does not.</p> <p>11 Q. But clearly it was prior to the summer 12 of 2007; correct?</p> <p>13 MR. MURRAY: Object to the form of the 14 question. Asked and answered, mischaracterizes his 15 prior testimony.</p> <p>16 THE WITNESS: Like I said, there was 17 exports all the time being exercised. I don't know 18 if this is the one that I'm remembering or not.</p> <p>19 BY MS. LEVIN:</p> <p>20 Q. When did you become aware of exports 21 being exercised all the time?</p> <p>22 A. When it was communicated from the egg 23 producers that they were occurring.</p> <p>24 Q. Well, clearly that was communicated 25 prior to the summer of 2007, wasn't it?</p>	<p style="text-align: center;">209</p> <p>1 inaccurate, wasn't it?</p> <p>2 A. No.</p> <p>3 MR. MURRAY: Objection.</p> <p>4 BY MS. LEVIN:</p> <p>5 Q. Well, you received this memo --</p> <p>6 A. I did, but there's exports going out all 7 the time.</p> <p>8 Q. Well, I understand. But we're talking 9 about when you first learned about the exports.</p> <p>10 A. And I'll restate. There's exports that 11 go out all the time.</p> <p>12 When the exports started creating an 13 impact on supply and I had the conversation with Bob 14 Krouse, may have been -- it wasn't in this time 15 frame.</p> <p>16 Q. Well, the -- wasn't in the time frame of 17 Exhibit 48?</p> <p>18 A. No.</p> <p>19 Q. Isn't Exhibit 45 dated February 15, 20 2007?</p> <p>21 A. It is.</p> <p>22 Q. And Exhibit 48, we've agreed, was dated 23 sometime prior to February of 2007?</p> <p>24 MR. MURRAY: Objection.</p> <p>25 BY MS. LEVIN:</p>

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<p style="text-align: center;">210</p> <p>1 Q. Correct?</p> <p>2 MR. MURRAY: Objection.</p> <p>3 Mischaracterizes the document.</p> <p>4 THE WITNESS: I don't know. I just know 5 that the time that I had a conversation with Bob 6 Krouse was going into the Thanksgiving holiday. 7 This is in February of 2007, which is in the totally 8 wrong time frame.</p> <p>9 BY MS. LEVIN:</p> <p>10 Q. Well, the question is which Thanksgiving 11 holiday we're talking about. Right?</p> <p>12 A. No.</p> <p>13 Q. And the conversation you've testified to 14 with Mr. Krouse pertained to your concern about 15 exports; correct?</p> <p>16 A. I didn't have a conversation with Bob 17 Krouse. He sent me the letter. It looks like this 18 letter is in response to this exhibit.</p> <p>19 Q. That Exhibit 48 is in response to 20 Exhibit 45?</p> <p>21 A. Yes -- no. 45 is a response to 22 Exhibit 48.</p> <p>23 Q. Correct.</p> <p>24 A. Because if you look at the timing on it, 25 this is February 15th. This is sometime in the</p>	<p style="text-align: center;">212</p> <p>1 Thanksgiving of 2005?</p> <p>2 A. I wasn't on the desk in 2005.</p> <p>3 Q. So it would have been around November of 4 2006; correct?</p> <p>5 A. No.</p> <p>6 MR. MURRAY: Objection; asked and 7 answered.</p> <p>8 BY MS. LEVIN:</p> <p>9 Q. Did you or did you not notice the issue 10 with respect to exports around Thanksgiving of some 11 year?</p> <p>12 A. Yes.</p> <p>13 Q. And then you had a conversation with 14 Mr. Krouse; correct?</p> <p>15 A. Correct.</p> <p>16 Q. And your conversation with Mr. Krouse 17 appears to have occurred in February of 2007; 18 correct?</p> <p>19 A. Wrong.</p> <p>20 Q. Isn't that what is reflected in 21 Exhibit 45?</p> <p>22 A. No.</p> <p>23 Q. What is reflected in Exhibit 45?</p> <p>24 A. I'll restate: I think 45 is an answer 25 to 48.</p>
<p style="text-align: center;">211</p> <p>1 end of January. And Kathy is saying that based 2 on -- we anticipate seeing an increase of 30, 3 35 cent per dozen for all eggs in weeks 1 of 1.</p> <p>4 Q. Right. So sometime -- Exhibit 48 is 5 sometime in late January 2007.</p> <p>6 A. Correct.</p> <p>7 Q. And then you had your conversation with 8 Mr. Krouse in February of 2007?</p> <p>9 A. Correct.</p> <p>10 Q. So you must have learned about the 11 exports sometime prior to January of 2007; correct? 12 You've testified you learned about them around 13 Thanksgiving.</p> <p>14 A. We're talking about one specific export.</p> <p>15 Q. Right. And that would have been in 16 November of 2006; correct; prior to Thanksgiving?</p> <p>17 A. No.</p> <p>18 MR. MURRAY: Objection; mischaracterizes 19 his testimony.</p> <p>20 THE WITNESS: Wrong. That's not what I 21 said.</p> <p>22 BY MS. LEVIN:</p> <p>23 Q. Well, if it was around Thanksgiving that 24 you noticed the problem and you had your 25 conversation in February of 2007, was it</p>	<p style="text-align: center;">213</p> <p>1 Q. Well, if 45 occurred two months after 2 Exhibit 48, I'm struggling with how it could be an 3 answer to it, or one month after 48.</p> <p>4 A. It's not one month. It's 15 days after.</p> <p>5 Q. Well, I don't understand how... 6 In any event, you received a memo in 7 late January 2007, advising you about exports; 8 correct?</p> <p>9 A. Yes.</p> <p>10 Q. And that the exports had created a 11 shortage in the market; correct?</p> <p>12 A. Yes.</p> <p>13 Q. And whoever prepared this memo believed 14 that that was going to cause an increase in prices; 15 correct?</p> <p>16 A. Correct.</p> <p>17 Q. The authors of this memo, nonetheless, 18 viewed the surplus of eggs in the market as an 19 opportunity for Kroger; correct?</p> <p>20 A. Yes.</p> <p>21 Q. And that opportunity was the opportunity 22 to purchase the surplus eggs; correct?</p> <p>23 A. We always continued to communicate that 24 open invitation, if a supplier has surplus, that we 25 want to help them move them through the system.</p>

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<p style="text-align: center;">214</p> <p>1 Q. And that you had purchased those eggs 2 below your normal contract price?</p> <p>3 A. Yes.</p> <p>4 Q. Correct?</p> <p>5 A. Has to be a value to both.</p> <p>6 Q. And when Kroger has excess product in 7 its inventory, that's an opportunity, isn't it, to 8 sell the product at a lower price to move the 9 inventory?</p> <p>10 MR. MURRAY: Objection; calls for speculation.</p> <p>11 BY MS. LEVIN:</p> <p>12 Q. Isn't that what Kroger would do?</p> <p>13 A. They're retailers, they do what they need to do move the inventory through the system.</p> <p>14 Q. And what you need to do when you have surplus inventory that's perishable is sell it; right?</p> <p>15 A. I would assume.</p> <p>16 Q. At whatever price you can get for it; correct?</p> <p>17 MR. MURRAY: Objection; calls for speculation.</p> <p>18 THE WITNESS: I don't handle that end. I don't know.</p>	<p style="text-align: center;">216</p> <p>1 average pricing.</p> <p>2 Q. And that's what is referred to as the 3 "previous Thursday"?</p> <p>4 A. Yes.</p> <p>5 Q. And what is the previous Thursday price 6 versus a rolling average price?</p> <p>7 A. Well, as I explained earlier, you buffer your costs going up and you buffer your costs going down.</p> <p>8 Q. But in terms of an actual contract, what 9 is previous Thursday? Do you just look at last 10 Thursday's Urner Barry price?</p> <p>11 A. Instead of having a four-week average price, you just take that Thursday price.</p> <p>12 So if you had a 90, a dollar, a dollar 10, dollar 20, and then you would average them 11 together, you would just take the last Thursday 12 close, if it was a dollar 10, minus your discount, 13 and that would be your price.</p> <p>14 Q. So again, the price would change every 15 week, but it would just be whatever the previous 16 Thursday price was plus whatever discount --</p> <p>17 A. Yes.</p> <p>18 Q. -- the Midwest contract called for?</p> <p>19 A. With no buffer for market volatility.</p>
<p style="text-align: center;">215</p> <p>1 MS. LEVIN: Let's mark as Exhibit 49 a 2 document bearing Bates Nos. KRGEGED00018603 -- the 3 second page does not have a Bates number on it, but 4 I think that's because some of these documents were 5 produced in native format.</p> <p>6 (Kroger Exhibit 49 was marked for 7 identification.)</p> <p>8 BY MS. LEVIN:</p> <p>9 Q. What is Exhibit 49?</p> <p>10 A. It's Bob Krouse's analysis.</p> <p>11 Q. Bob Krouse's analysis of what?</p> <p>12 A. Of pricing metrics.</p> <p>13 Q. And Exhibit 49 is dated January 19, 14 2007; correct?</p> <p>15 A. Yes.</p> <p>16 Q. And it's an email that was sent to you; 17 correct?</p> <p>18 A. Yes, it was.</p> <p>19 Q. And do you doubt that you received 20 Exhibit 49 on or about January 19, 2007?</p> <p>21 A. No.</p> <p>22 Q. Can you explain what Mr. Krouse's 23 analysis is about.</p> <p>24 A. He was explaining the cost impact of using a four-week rolling average versus a weekly</p>	<p style="text-align: center;">217</p> <p>1 Q. Did Kroger ever have any contracts just 2 using the previous Thursday price?</p> <p>3 A. Not that I'm aware of.</p> <p>4 Q. Was Mr. Krouse suggesting that that 5 would be a good idea, to use previous Thursday?</p> <p>6 A. No.</p> <p>7 Q. Do you know why Mr. Krouse was sending 8 you an email about the difference between the 9 previous four-week average market versus the 10 previous Thursday?</p> <p>11 A. He was trying to explain coming off of cost-plus, what the cost of using a four-week 12 rolling average would be to -- incurred to the 13 supplier.</p> <p>14 Q. So he was trying to explain to you the 15 difficulties Midwest was facing in going from 16 cost-plus to the four-week average?</p> <p>17 A. To a four-week rolling average.</p> <p>18 Q. Rolling average; right.</p> <p>19 Was anything done to alleviate that 20 difficulty for Midwest?</p> <p>21 A. I do not know.</p> <p>22 Q. Are you familiar with the hedging 23 components of the Midwest contracts prior to your 24 taking over from Mr. Stull?</p>

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<p style="text-align: right;">218</p> <p>1 A. What do you mean "familiar"? 2 Q. Let me see if I can show you some 3 documents. 4 A. Did I understand the calls and puts? 5 Q. Yes. 6 A. Somewhat, yes. 7 Q. Did you review Mr. Stull's testimony on 8 this particular issue? 9 A. I read his deposition. 10 Q. Right. Did you see anything in his 11 deposition that you disagreed with? 12 MR. MURRAY: Objection; overly broad. 13 THE WITNESS: It was a long deposition. 14 BY MS. LEVIN: 15 Q. Well, I understand. But did you see 16 anything in it that you disagreed with? 17 A. Not that I can recall. 18 MS. LEVIN: Let's mark as Exhibit 50 a 19 document bearing Bates Nos. KRGE00019004 through 20 07. 21 (Kroger Exhibit 50 was marked for 22 identification.) 23 (Pause.) 24 THE WITNESS: Okay. 25 BY MS. LEVIN:</p>	<p style="text-align: right;">220</p> <p>1 in depends on the premium you pay for the calls and 2 the puts. 3 Q. So if you could explain that in 4 practical terms in terms of what it is you're doing 5 here. I'm not sure that members of the jury would 6 understand all of that. 7 MR. MURRAY: Object to the comment. 8 BY MS. LEVIN: 9 Q. When it says [reading]: We can lock in 10 with the corn cost at 2.53 per bushel, what does 11 that mean? 12 A. They're going to contract their volume 13 of usage at the CBOT, Chicago Board of Trade, costs 14 at 2.53. 15 Q. So they locked in some quantity of corn 16 at 2.53 per bushel? 17 A. They've locked in their quantity of corn 18 at 2.53. 19 Q. Whatever the quantity is? 20 A. Whatever they've estimated their usage 21 to be. 22 Q. And they've locked in their soybean, 23 whatever quantity it is that they've estimated, at 24 \$202.11? 25 A. For soybean meal at 202.11 per ton.</p>
<p style="text-align: right;">219</p> <p>1 Q. What is Exhibit 50? 2 A. It is a cost-plus -- it's a snapshot on 3 the corn and soy market for a cost-plus program from 4 2006 to 2007. 5 Q. So it's correspondence from Mr. Krouse 6 to Mr. Stull dated September 12th, 2005? 7 A. Yes. 8 Q. And it pertains to some aspect of the 9 cost-plus contract that was in place between Midwest 10 and Kroger at that point in time? 11 A. Yes. 12 Q. Can you explain to me what it is that 13 Mr. Krouse is describing to Mr. Stull. 14 A. What Mr. Krouse is describing to 15 Mr. Stull is that they're looking at -- or doing 16 forward pricing of corn and soy meal with calls and 17 puts put on the grain market to protect their 18 position. 19 Q. And can you describe what calls and puts 20 are. 21 A. Calls and puts are put on the market to 22 protect the buyer on market inflation or market 23 declines. 24 And you put them in at different strike 25 points. And depending on what strike points you put</p>	<p style="text-align: right;">221</p> <p>1 Q. And then it says, "In addition, we 2 purchased 133 July 2006 corn puts." 3 What does that mean? 4 A. 133 contracts for 2006 corn put at a 5 strike point of 230. 6 Q. What does that mean? 7 A. Basically what they're doing is they're 8 protecting their grain buying -- the downside and 9 the upside. 10 It's insurance on their position. 11 Q. What exactly is a corn put? 12 A. It's just a term they use. It's 13 basically insurance. 14 Q. How does it operate as insurance? 15 A. Well, if the market would drop down to 16 230, it pays back the difference. But you pay a 17 premium to have that protection. 18 Q. It pays back the difference between 19 what? 20 A. It pays a -- back part of the cost of 21 that market move. 22 Q. A market move from what to what? 23 A. From 254 down to 230. 24 Q. From 253 down to 230? 25 A. Or 253 down to '30. So if the market</p>

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<p style="text-align: center;">222</p> <p>1 would drop 23 cents, you'd have put calls in there 2 at certain amounts. And depending on where that -- 3 what that amount is, the strike points on it, 4 depends on the amounts you pay in premium to have 5 them.</p> <p>6 Q. And the same thing is true with respect 7 to the soybean meal price?</p> <p>8 A. Correct.</p> <p>9 Q. So you're basically ensuring that if the 10 price falls down -- if the price falls below the 253 11 per bushel, you've got some sort of insurance to 12 protect yourself?</p> <p>13 A. You have protection; correct.</p> <p>14 Q. And you've got protection down to \$2.30?</p> <p>15 A. Uh-huh.</p> <p>16 Q. "Yes"?</p> <p>17 A. Yes.</p> <p>18 Q. And for the soybean meal, you've 19 purchased -- you've locked in at \$202.11; and 20 there's no puts on the soybean meal. You can strike 21 that.</p> <p>22 Let's take a look or mark as Exhibit 51, 23 a document bearing Bates No. KRGE00019008 to 19009. 24 (Kroger Exhibit 51 was marked for 25 identification.)</p>	<p style="text-align: center;">224</p> <p>1 And Midwest exercised the option to buy 2 the corn at the lower price?</p> <p>3 A. Correct.</p> <p>4 Q. And that redounded to Krogers' benefit; 5 correct?</p> <p>6 A. Correct.</p> <p>7 Q. Because it was a cost-plus contract?</p> <p>8 A. Correct.</p> <p>9 Q. And the reference to Krogers' feature 10 allowance. Do you know what that is?</p> <p>11 A. It's the accrual from the big A.</p> <p>12 Q. Right. The --</p> <p>13 A. That we don't talk about.</p> <p>14 Q. The bad thing that we don't do anymore?</p> <p>15 A. That we don't talk about that anymore.</p> <p>16 Q. Okay. But in any event, at this time 17 there was a feature allowance, and that redounded to 18 Krogers' benefit at some point in time?</p> <p>19 A. Yes.</p> <p>20 MS. LEVIN: Let's mark as Exhibit 52 a 21 document bearing Bates Nos. KRGE00020654 through 22 20655.</p> <p>23 (Kroger Exhibit 52 was marked for 24 identification.)</p> <p>25 (Pause.)</p>
<p style="text-align: center;">223</p> <p>1 BY MS. LEVIN: 2 Q. Have you had a chance to review 3 Exhibit 51? <p>4 A. I have.</p> <p>5 Q. And is Exhibit 51 a letter from 6 Mr. Krouse to Mr. Stull dated September 23, 2005? <p>7 A. It is.</p> <p>8 Q. Can you tell me what Mr. Krouse is 9 reporting to Mr. Stull on Exhibit 51? <p>10 A. That they exercised the puts, which 11 netted them \$321,225.76, which was placed into the 12 feature allowance, and that their price on eggs 13 through the balance of the year would be 77.17.</p> <p>14 Q. So as a result of the sale of the puts, 15 Krogers' price for eggs was decreased? <p>16 A. I'm not sure what the current price was 17 or if it was -- it was -- it would be held at 18 77.13 cents per dozen.</p> <p>19 Q. Does this mean that the price of corn, 20 in fact, fell -- <p>21 A. Yes.</p> <p>22 Q. -- during the fall of -- September of 23 2005? <p>24 A. That would be my speculation.</p> <p>25 Q. Okay, that it fell.</p> </p></p></p></p></p></p>	<p style="text-align: center;">225</p> <p>1 BY MS. LEVIN: 2 Q. What is Exhibit 52? <p>3 A. It looks like it's an email 4 communication between Midwest Poultry and Kroger.</p> <p>5 Q. And including some communications to and 6 from you; correct?</p> <p>7 A. Yes.</p> <p>8 Q. Can you tell me what the gist is of what 9 was being reported in Exhibit 52? <p>10 A. Basically what I was reporting to our 11 senior managers, the effect of purchasing surplus 12 inventory in the overall effect on sales volume for 13 the year.</p> <p>14 Q. So as a result of purchasing excess 15 inventory from Midwest, Krogers' volume was up 16 7-1/2 percent over last year? <p>17 A. That's what it says, yes.</p> <p>18 Q. And Kroger had secured over 5 million 19 dozen eggs at a reduced cost; correct?</p> <p>20 A. Correct.</p> <p>21 Q. And that was 5 million dozen eggs from 22 Midwest?</p> <p>23 A. Yes.</p> <p>24 Q. And these were surplus eggs? <p>25 A. Yes.</p> </p></p></p></p>

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<p style="text-align: center;">226</p> <p>1 Q. And that had saved the company over 2 \$1,250,000; correct? 3 A. Correct. 4 Q. And then what is Mr. Cornelius' response 5 back to you? It's on the first page of Exhibit 52. 6 A. The part was [reading]: Good job. Are 7 you tracking savings? 8 Q. Right. Then he asks if you can figure 9 out how to offset it against the increased cost on 10 the nonfeature eggs for the promotion week due to 11 the increased Urner Barry cost. 12 A. I don't recall what he's trying to get 13 there. 14 MS. LEVIN: Let's take a look at a 15 document bearing Bates No. KRGEG00019277. 16 (Kroger Exhibit 53 was marked for 17 identification.) 18 THE WITNESS: Okay. 19 BY MS. LEVIN: 20 Q. What is Exhibit 53? 21 A. It's a communication between Gary Stull 22 and Bob Hodges. 23 Q. And dated February 15, 2005? 24 A. Correct. 25 Q. And before we talk about the document</p>	<p style="text-align: center;">228</p> <p>1 A. Yes. 2 Q. And as a result, did the incumbent then 3 retain the business? 4 A. Yes. 5 Q. Do you know how often that happened 6 while you were in charge of egg procurement? 7 A. It probably happened on every bid, one 8 or the other KMAs. 9 Q. On? 10 A. Not on all KMAs. 11 Q. But every time you sent out an RFQ for 12 all the KMAs, at least on some number of KMAs, the 13 incumbent was not the low bidder but was given an 14 opportunity to rebid and became the low bidder? 15 A. Yes. 16 Q. Do you know whether that happened while 17 Mr. Stull was the manager of egg procurement? 18 A. I do not. 19 Q. Do you know whether that was even an 20 offered possibility while Mr. Stull was the manager 21 of egg procurement? 22 A. I do not. 23 Q. Let's take a look at Exhibit 53, and 24 then we'll take a break. 25 In Exhibit 53, Mr. Hodges of Moark</p>
<p style="text-align: center;">227</p> <p>1 itself, when Kroger solicited bids through the RFQ 2 process and received the bids back, did you then 3 negotiate with the suppliers over what the contract 4 price would be? 5 A. No. 6 Q. No? 7 A. The only thing we would give the 8 incumbent, the right to rebid. 9 Q. So that was a right of first refusal 10 type thing? 11 A. Yes. 12 Q. And did the incumbent ever exercise the 13 right of first refusal? 14 A. Explain. 15 Q. Well, was there ever an occasion where 16 you offered the right to the incumbent to rebid and 17 the incumbent accepted? 18 A. Yes. 19 Q. And the incumbent rebid? 20 A. Yes. I would communicate with him -- or 21 we weren't permitted to communicate prices, but we 22 could communicate percentage and say your bid's off 23 5 percent, would you like to rebid? 24 Q. And on occasion, the incumbent, in fact, 25 did rebid?</p>	<p style="text-align: center;">229</p> <p>1 writes to Mr. Stull, "Moark will be reducing the 2 price of eggs to Smith's Food & Drug in the Phoenix 3 division of Kroger by 2 cents per dozen effective 4 February 27, 2005." 5 Do you see that? 6 A. Yes. 7 Q. So it appears that on this particular 8 occasion, Kroger went to Moark and asked it to 9 reduce whatever the contracted price was for this 10 particular division; correct? 11 A. Yes. 12 Q. And Moark agreed to do that; correct? 13 A. Yes. 14 Q. And the document further states that, 15 "This move will eliminate all margin to Moark on the 16 account;" is that correct? 17 A. Yes. 18 Q. Did Kroger, on occasion, approach its 19 suppliers mid contract and ask them to reduce their 20 price? 21 A. I do not, no. 22 Q. Did that ever happen while you were the 23 manager of egg procurement? 24 A. I said, "I do not, no." 25 Q. Oh, you just don't recall whether --</p>

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<p style="text-align: center;">230</p> <p>1 A. No. I said I do not ask suppliers to 2 reduce their cost in the middle of a contract.</p> <p>3 Q. Okay. So it was I do not, no. I'm just 4 trying to understand what your answer was before.</p> <p>5 A. Oh, you mean on the Gary Stull question?</p> <p>6 Q. No, in terms of contracts. When we 7 awarded the contract, you say you have never gone 8 and asked a supplier to reduce its price.</p> <p>9 A. Correct.</p> <p>10 Q. Obviously Mr. Stull did it at least 11 once, because we've got Exhibit 53 in front of us; 12 correct?</p> <p>13 MR. MURRAY: Objection; lack of 14 foundation, calls for speculation.</p> <p>15 You can answer if you know.</p> <p>16 BY MS. LEVIN:</p> <p>17 Q. Isn't that what Exhibit 53 states?</p> <p>18 A. Yes, that's what it states.</p> <p>19 Q. Do you have any doubt that Exhibit 53 is 20 accurate?</p> <p>21 A. I do not.</p> <p>22 MS. LEVIN: Okay. We can take a break.</p> <p>23 THE VIDEOGRAPHER: We are going off the 24 record. This is the end of Disk 3. Time on video 25 is 15:48.</p>	<p style="text-align: center;">232</p> <p>1 Q. How does Kroger go about setting price 2 to customers?</p> <p>3 A. I do not know.</p> <p>4 Q. Let's take a look at Topic 28 in the 5 notice of deposition that you said you were prepared 6 to testify to.</p> <p>7 So in Exhibit 2, which is the notice of 8 deposition, Topic 28, is the prices Kroger charges 9 its customers for eggs or egg products, including 10 but not limited to, A, how Kroger determines price.</p> <p>11 Are you not able to testify to that 12 topic?</p> <p>13 A. I don't have a 28. I go from 24 to 29.</p> <p>14 Q. Well, this morning when you were listing 15 the topics that you were prepared to testify to, 16 Topic 28 was one of them.</p> <p>17 Is that the official exhibit you're 18 looking at?</p> <p>19 MR. MURRAY: I don't think it is. No, I 20 don't think this is.</p> <p>21 BY MS. LEVIN:</p> <p>22 Q. Look in your pile, back down to 23 Exhibit 2. It should have a sticker on it.</p> <p>24 A. It's actually on the back page.</p> <p>25 Q. So Topic 28, you have that in front of</p>
<p style="text-align: center;">231</p> <p>1 (Recess taken, during which 2 Ms. Osborn departed the deposition 3 proceedings.)</p> <p>4 THE VIDEOGRAPHER: We're going back on 5 the record. This is the beginning of Disk 4. Time 6 on video is 15:57.</p> <p>7 (Kroger Exhibit 54 was marked for 8 identification.)</p> <p>9 BY MS. LEVIN:</p> <p>10 Q. Mr. Klump, I've handed you a document 11 Bates numbered KRGEGED00000604 through 607. It's 12 marked as Exhibit 54.</p> <p>13 A. Yes.</p> <p>14 Q. What is Exhibit 54?</p> <p>15 A. It's a communication to me from Joel 16 Crowder.</p> <p>17 Q. And what is the subject of the 18 communication?</p> <p>19 A. Subject of the communication is a 20 competitive situation in the Columbus KMA. We were 21 getting beat at retail.</p> <p>22 Q. Okay. So the -- this is a document 23 relating to Krogers' price to its customers; 24 correct?</p> <p>25 A. Yes.</p>	<p style="text-align: center;">233</p> <p>1 you?</p> <p>2 A. Yes, I do.</p> <p>3 Q. And it's -- I correctly read it, "The 4 prices Kroger charges its customers for eggs or egg 5 products including but not limited to the 6 following":</p> <p>7 A. Yes.</p> <p>8 Q. "How Kroger determines price." Are you 9 able to testify on that topic?</p> <p>10 A. I can talk to who determines that price. 11 And it's set by each KMA in each division by the 12 merchandising manager. It's based on the 13 competition in the marketplace.</p> <p>14 Q. So you say that the price at which shell 15 eggs are sold is determined on a KMA-by-KMA basis?</p> <p>16 A. Yes.</p> <p>17 Q. And then within the KMA is there a 18 single price for all shell eggs sold?</p> <p>19 A. In the KMA?</p> <p>20 Q. Right.</p> <p>21 A. In a single KMA?</p> <p>22 Q. Yes.</p> <p>23 A. I am not -- yes, I would say yes, it is. 24 They set the price based -- or it may be changed 25 by -- let me retract that.</p>

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<p style="text-align: right;">234</p> <p>1 No, it would. Not if there's different 2 divisions in the KMA with certain competitions, they 3 may alter their pricing structure by divisions.</p> <p>4 Q. So -- go ahead.</p> <p>5 A. And a division is -- KMAs are made up of 6 different divisions or zones. And if one division 7 is seeing increased competition from a certain 8 supplier base, then they have the latitude to change 9 the price in that division to reflect that need.</p> <p>10 Q. So how many divisions are there across 11 the entire country?</p> <p>12 A. I do not know. It's based on the size 13 of the KMA and the geographic location.</p> <p>14 Q. Do you know the maximum number of 15 divisions within a KMA?</p> <p>16 A. No, I do not.</p> <p>17 Q. Do you know -- have any estimate as to 18 how many divisions there are within the entire 19 country?</p> <p>20 A. I do not.</p> <p>21 Q. Is there something you could look at 22 that would answer that question for you?</p> <p>23 A. Yes.</p> <p>24 Q. What would you have to look at?</p> <p>25 A. Our KCMS data that would -- it breaks it</p>	<p style="text-align: right;">236</p> <p>1 they're running eggs at 99 cents a dozen. Our 2 current price is a dollar 49 or a dollar 39. They 3 may opt to drop that price in that division to a 4 lower level to be competitive with the Aldi's or 5 another competitor.</p> <p>6 Q. So all stores within that KMA that are 7 not within the division where or the Aldi's 8 competitive situation is occurring would maintain 9 \$1.49 as their price, correct?</p> <p>10 A. Yes.</p> <p>11 Q. And the stores within the division where 12 Aldi's is presenting the competitive situation would 13 be able to lower their price?</p> <p>14 A. They would be directed to lower their 15 price, yes.</p> <p>16 Q. When you say "directed," directed by 17 whom?</p> <p>18 A. The KMA.</p> <p>19 Q. So the decision is still made by the 20 KMA?</p> <p>21 A. Yes.</p> <p>22 Q. So the division doesn't have the right 23 to make that decision, they only report to the KMA 24 the situation, and then the KMA makes the decision?</p> <p>25 A. Correct. But your question was, does</p>
<p style="text-align: right;">235</p> <p>1 out by zones or divisions.</p> <p>2 Q. But in any event, prices -- well, let me 3 see if I understand.</p> <p>4 A KMA will set a price for the entire 5 KMA, but then a division has the right to deviate 6 from that based on a competitive situation?</p> <p>7 A. Let me clarify. The divisions make up 8 the KMA.</p> <p>9 Q. Right.</p> <p>10 A. The KMA has autonomy over their prices.</p> <p>11 Q. By "autonomy," you mean each KMA has the 12 ability to set the retail price for the stores 13 within the KMA?</p> <p>14 A. Yes.</p> <p>15 Q. And then what is the division's ability 16 to alter that?</p> <p>17 A. The division is not.</p> <p>18 But what I said is if there's heavy 19 competition in one sector of the KMA's division, 20 they may alter that price to meet a price point of a 21 competitor.</p> <p>22 Q. So can you give me an example of how 23 that would work.</p> <p>24 A. Say we had zone A or division A in the 25 Columbus KMA, and Aldi's just put in a new store and</p>	<p style="text-align: right;">237</p> <p>1 all the stores in the division or in the KMA have 2 the same price, and that's why I was answering --</p> <p>3 Q. Right.</p> <p>4 A. -- it can be -- there can be some 5 altering the divisions -- or the KMAs set the price, 6 but it can vary if there's competition in certain 7 divisions in their KMA.</p> <p>8 Q. Are there separate individuals for each 9 KMA that set the price for a particular KMA? Does 10 each KMA have its own individual that sets the price 11 for the KMA?</p> <p>12 A. Yes.</p> <p>13 Q. And what position does that person hold?</p> <p>14 A. I believe it's the merchandiser; and in 15 conjunction with the dairy team at the KMA.</p> <p>16 Q. And that merchandiser has to approve any 17 deviations within the KMA from the price set for the 18 KMA?</p> <p>19 A. He is -- he or she is the one that sets 20 the price.</p> <p>21 Q. Okay. And is there any other reason 22 that might bring about a reduction in price for a 23 division other than a competitive situation?</p> <p>24 A. Other than a feature?</p> <p>25 Q. Other than a competitive situation.</p>

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<p style="text-align: right;">238</p> <p>1 A. A feature. 2 Q. A feature. 3 And are features determined on a 4 KMA-by-KMA basis? 5 A. No. We talked about this earlier: 6 Features are -- there is a corporate directive for 7 features. That's a suggested plan that they 8 feature. They can buy in or buy out. But KMAs 9 still have the autonomy to run a feature independent 10 of the corporate directive. 11 Q. So the corporate -- there may be a 12 corporate directive to run a feature, and all KMAs 13 have to run that feature? 14 A. No. 15 Q. KMAs can decide? 16 A. KMAs have the decision whether to run 17 the feature or not. 18 Q. Whether to run the feature -- 19 A. At that price point. 20 Q. Whether to run the feature that 21 corporate has directed? 22 A. Correct. 23 Q. Can the KMA also decide on its own to 24 run a feature regardless of whether corporate has 25 directed it or not?</p>	<p style="text-align: right;">240</p> <p>1 "Talked with one of the producers last 2 week about Aldi and Walmart's pricing." 3 Do you know which producer you spoke 4 with? 5 A. No. 6 Q. Do you know what KMA this producer 7 served? 8 A. No. 9 Q. Does it appear that it related to the 10 Columbus division? 11 A. It states Columbus division, so I would 12 say, yes, it is the Columbus division. 13 Q. And that producer would be Midwest? 14 A. Yes, it would. 15 Q. So you talked with Midwest last week 16 about Aldi and Walmart's pricing. "And they are all 17 using the market-based pricing as we are, but they 18 are not using the four-week rolling average, which 19 would put their prices higher than ours." 20 Are you talking about Aldi and Walmart's 21 pricing to their customers and how it differs from 22 your price, from Krogers' price to its customers? 23 A. First of all, Midwest Poultry doesn't 24 supply Aldi. 25 Q. Well, I understand.</p>
<p style="text-align: right;">239</p> <p>1 A. Yes. 2 Q. And is there any criteria for when to 3 run a feature? 4 A. No. 5 Q. That is purely in the discretion of each 6 KMA? 7 A. Yes. 8 Q. So looking at Exhibit 54, there's an 9 email from you to Joyce McIntosh. Do you see that? 10 A. Yes, I do. 11 Q. What are you referring to Joyce -- first 12 of all, tell us who Joyce is. 13 A. Joyce was the category manager for the 14 corporate brands group after Randy Payne in -- I'm 15 reporting to him that Walmart and Aldi is using eggs 16 as a loss leader in that they're not truly 17 reflecting the cost of goods at retail. 18 Q. Right. And why are you reporting this 19 to Joyce? 20 A. Because she's the category manager for 21 banner brands. 22 Q. It states that, "One of the producers 23 even offered the comment that we are sourcing our 24 eggs cheaper" -- well, let's go back to the first 25 sentence.</p>	<p style="text-align: right;">241</p> <p>1 A. So I wouldn't be talking to Midwest 2 Poultry about an Aldi's price. 3 And secondly, with my comments to Joyce, 4 this is one of the pitfalls of a four-week rolling 5 average: When you roll up and you roll down, it 6 takes us four weeks on a market decline to be back 7 at a true market price, because we're buffering the 8 higher cost back into our system. 9 Q. Let me ask it this way: The Aldi and 10 Walmart's pricing that's being discussed in here, do 11 you understand that to be price to Aldi and Walmarsts 12 or Aldi and Walmart's price to their customers? 13 A. Which -- 14 Q. In the email from you to Joyce. 15 A. Yes. 16 Q. Which one? What kind of pricing are we 17 talking about for Aldi and Walmart? 18 A. It's their cost of goods. 19 Q. So you were discussing with Midwest the 20 price that Aldi and Walmarsts was paying to their 21 suppliers? 22 A. No. 23 MR. MURRAY: Objection; mischaracterizes 24 his testimony. 25 MS. LEVIN: Well, that's what I'm trying</p>

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<p style="text-align: center;">242</p> <p>1 to understand. Tell me what price it is for Aldi 2 and Walmarts that's being discussed with Midwest. 3 THE WITNESS: Midwest doesn't supply 4 Aldi.</p> <p>5 BY MS. LEVIN: 6 Q. I understand. But the sentence is, 7 "Talked with one of the producers last week about 8 Aldi and Walmart's pricing." 9 What pricing for Aldi and Walmarts were 10 you discussing? 11 A. Probably where the pricing metrics are 12 using, whether they're on market-based pricing or a 13 cost-plus pricing. 14 Q. So you were speaking with one of your 15 suppliers about the price that Aldi and Walmart was 16 paying to purchase eggs? 17 A. No, I was talking about the metrics. 18 Q. Of about the methodology they were 19 using? 20 A. Yes. 21 Q. So you were discussing with one of your 22 producers the pricing methodology that Aldi and 23 Walmarts used to purchase eggs? 24 A. Yes. 25 Q. Is that right?</p>	<p style="text-align: center;">244</p> <p>1 that would be a shell egg provider, about if not the 2 actual pricing to Aldi and Walmarts, then about the 3 contractual provisions for how prices to Aldi and 4 Walmarts are set? 5 A. No. I would venture to -- 6 Q. Then let's not play 20 questions, Mr. -- 7 MR. MURRAY: Don't cut him off. He was 8 answering the question and you cut him off. 9 BY MS. LEVIN: 10 Q. Tell me what this sentence is about. 11 A. If we got a price report back and Aldi's 12 is running eggs at 99 cents, the question may, how 13 is it that they can afford to run eggs at 99 cents. 14 And their comment would be that they got to be doing 15 it as a loss leader. 16 Q. So you got a report from whom that Aldi 17 and Walmart's prices were low? 18 A. We get pricing reports through P.L. 19 Marketing and Daymon. They do price checks. 20 Q. You collect data in the marketplace 21 about what your competitors are selling shell eggs 22 for? 23 A. Yes. 24 Q. And from whom do you get that 25 information?</p>
<p style="text-align: center;">243</p> <p>1 A. Yes. 2 Q. And you don't know which producer this 3 was? 4 A. No. It's not -- it's not Midwest 5 Poultry. 6 Q. And was the producer providing you with 7 information about the price or about the methodology 8 they had in their contract with Aldi and Walmarts 9 for the sale of eggs? 10 A. No. 11 Q. Well, let's try one more time. Why 12 don't you tell me what this first sentence is 13 discussing. 14 What did you discuss with one of the 15 producers? 16 A. Probably, if I had to look at this 17 statement, I really don't know, would be my answer. 18 And I don't want to speculate. 19 Q. I mean, these are your words -- 20 A. Yes. 21 Q. -- so speculation is really, I don't 22 think that's going on here. 23 MR. MURRAY: Object to the comment. 24 BY MS. LEVIN: 25 Q. But you have talked with a producer,</p>	<p style="text-align: center;">245</p> <p>1 A. P.L. and Daymon. 2 Q. What are -- 3 A. Brokers. 4 Q. Excuse me? 5 A. Brokers. 6 Q. And how do the brokers go about 7 collecting that information? 8 A. I do not know. 9 Q. But the brokers, do they do this on a 10 regular basis -- 11 A. Yes. 12 Q. -- collect market information for you 13 and provide you with the information that your 14 competitors are charging in the marketplace? 15 A. Yes. 16 Q. So you got some kind of information 17 about Aldi's and Walmart having retail prices that 18 were lower than yours? 19 A. Yes. 20 Q. And then there was an attempt to 21 speculate as to how it is that Aldi's and Walmarts 22 were pricing their eggs in the marketplace lower 23 than Krogers'; correct? 24 A. Correct. 25 Q. And was this one of your suppliers that</p>

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<p style="text-align: center;">246</p> <p>1 you were having this conversation with?</p> <p>2 A. Yes. It must have been, because I</p> <p>3 talked to the producer.</p> <p>4 Q. And how is it that you learned that</p> <p>5 Aldi's and Walmart's price are -- that Aldi's and</p> <p>6 Walmarts are using market-based pricing?</p> <p>7 A. Because it was probably told to me by</p> <p>8 the supplier. They're on the same pricing program</p> <p>9 you are and they're probably doing it as a loss</p> <p>10 leader.</p> <p>11 Q. So the supplier, whoever it was that you</p> <p>12 spoke with, supplied both you and Aldi and Walmarts;</p> <p>13 is that correct?</p> <p>14 A. No, because our supplier for the</p> <p>15 Columbus KMA is Midwest Poultry.</p> <p>16 Q. Well, I thought you weren't sure that</p> <p>17 this was the Columbus KMA. Are you now sure?</p> <p>18 A. Well, it says it right at the top, what</p> <p>19 is our cost for the Columbus division.</p> <p>20 Q. Okay. So you're now sure that your</p> <p>21 email to Joyce is relating to the Columbus KMA?</p> <p>22 A. From what the email says, yes.</p> <p>23 Q. So it's about Aldi and Walmart's pricing</p> <p>24 in the Columbus KMA?</p> <p>25 A. Apparently.</p>	<p style="text-align: center;">248</p> <p>1 A. No, I said Midwest is not the supplier</p> <p>2 to Aldi.</p> <p>3 Q. I understand. And you also said it</p> <p>4 couldn't have been Midwest that you spoke with;</p> <p>5 right?</p> <p>6 A. Yes, because they're not a supplier.</p> <p>7 And based on that information that is in here, I</p> <p>8 don't know how they would ever know that.</p> <p>9 Q. So you believe it would have to be the</p> <p>10 supplier to Aldi and Walmarts that you spoke with;</p> <p>11 correct?</p> <p>12 A. It would be another supplier that</p> <p>13 supplies Aldi or Walmart.</p> <p>14 Q. And this supplier told you that Aldi and</p> <p>15 Walmarts was using the market-based pricing, as we</p> <p>16 are, but not using the four-week rolling average?</p> <p>17 A. The four-week rolling average was my</p> <p>18 speculation into there. And I know we're the only</p> <p>19 ones currently in the marketplace using it, or was</p> <p>20 the only ones using it.</p> <p>21 And, like I said, probably the question</p> <p>22 came up, I can't understand how Aldi can offer a</p> <p>23 price point of 99 cents, and their reply was they're</p> <p>24 on the same market system you are, they're probably</p> <p>25 running it at a loss leader.</p>
<p style="text-align: center;">247</p> <p>1 Q. And who is your supplier in the Columbus</p> <p>2 KMA?</p> <p>3 A. Midwest Poultry.</p> <p>4 Q. So you're sure, however, that it was not</p> <p>5 Midwest Poultry that you talked to about Aldi and</p> <p>6 Walmart's pricing?</p> <p>7 A. Yes.</p> <p>8 Q. What producer was it?</p> <p>9 A. I don't know. But Midwest Poultry does</p> <p>10 not supply Aldi.</p> <p>11 Q. Well, I understand that.</p> <p>12 A. Well . . .</p> <p>13 Q. Doesn't mean Midwest Poultry doesn't</p> <p>14 know something about Aldi and Walmart's pricing.</p> <p>15 Do you know who does supply Aldi and</p> <p>16 Walmart, or who did in 2009?</p> <p>17 A. No, I do not.</p> <p>18 Q. But whoever the producer was that you</p> <p>19 spoke with, they were aware of the terms on which</p> <p>20 Aldi and Walmart purchased shell eggs?</p> <p>21 A. Apparently whoever I talked to did.</p> <p>22 Q. And you don't know if it was the</p> <p>23 supplier to Aldi and Walmarts?</p> <p>24 A. No, I don't.</p> <p>25 Q. But you just know it wasn't Midwest?</p>	<p style="text-align: center;">249</p> <p>1 And I built in the speculation, in a</p> <p>2 declining market, we're probably riding the high</p> <p>3 market down, which is raising our cost.</p> <p>4 Q. Your email also says, "One of the</p> <p>5 producers even offered the comment that we are</p> <p>6 sourcing our eggs cheaper than they are."</p> <p>7 You had conversations with multiple</p> <p>8 producers on the subject of Aldi and Walmart's</p> <p>9 pricing?</p> <p>10 A. I don't know.</p> <p>11 Q. Excuse me?</p> <p>12 A. I don't know.</p> <p>13 Q. Well, your sentence is, "One of the</p> <p>14 producers even offered the comment." Does that</p> <p>15 suggest to you that you spoke to more than one</p> <p>16 producer?</p> <p>17 A. I don't know.</p> <p>18 Q. You can't --</p> <p>19 A. This is 2009.</p> <p>20 Q. Well, I understand what it is, but these</p> <p>21 are your words, Mr. Klump.</p> <p>22 Would you have said one of the producers</p> <p>23 if you only spoke to one producer?</p> <p>24 A. That's speculation.</p> <p>25 Q. You can't say that when you make a</p>

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<p style="text-align: center;">250</p> <p>1 sentence -- write a sentence that says "One of the 2 producers offered a comment," that indicates that 3 you spoke to more than one producer?</p> <p>4 MR. MURRAY: Object to the form of the 5 question.</p> <p>6 THE WITNESS: I don't know.</p> <p>7 BY MS. LEVIN:</p> <p>8 Q. You're unable to interpret those words 9 in your own email?</p> <p>10 A. Yes.</p> <p>11 MR. MURRAY: Object to the form of the 12 question.</p> <p>13 BY MS. LEVIN:</p> <p>14 Q. Are you able to tell us who the "we" is 15 in that sentence? Or the "they"?</p> <p>16 A. I cannot.</p> <p>17 Q. Why would you have been having a 18 conversation with producers about Aldi and Walmart's 19 pricing?</p> <p>20 A. I don't know.</p> <p>21 Q. Why would you have been having a 22 conversation with producers about the pricing 23 methodology used in Aldi and Walmart's supply 24 contracts?</p> <p>25 A. Because there was a lot of discussion at</p>	<p style="text-align: center;">252</p> <p>1 A. Yes. 2 Q. And that came to your attention? 3 A. An email was sent to me. 4 Q. And why was that brought to your 5 attention? 6 A. Because they were wondering how they 7 could source eggs cheaper than us. 8 Q. How Aldi and Walmarts could source eggs 9 cheaper than Kroger? 10 A. Uh-huh. 11 Q. And particularly how Aldi and Walmarts 12 could source eggs cheaper than Kroger in the 13 Columbus division? 14 A. Correct. 15 Q. Why would anybody other than Midwest 16 have that question for you? 17 A. Midwest didn't have the question. 18 Q. I understand you can't remember who the 19 producer was. You're just convinced it wasn't 20 Midwest. And I'm asking you, why would anybody 21 other than your supplier in the Columbus division 22 care what price Aldi and Walmarts are charging in 23 Columbus? 24 MR. MURRAY: Object to the form of the 25 question, calls for speculation, lack of foundation.</p>
<p style="text-align: center;">251</p> <p>1 the time about suppliers moving to grain-based 2 pricing.</p> <p>3 Q. To grain-based pricing?</p> <p>4 A. Uh-huh.</p> <p>5 Q. What is grain-based pricing?</p> <p>6 A. Same as cost-plus but a little different 7 twist on it.</p> <p>8 Q. But in this particular email there's no 9 discussion about anybody using grain-based pricing; 10 is there?</p> <p>11 A. No.</p> <p>12 Q. Did you have any thought that Aldi and 13 Walmarts might be using grain-based pricing?</p> <p>14 A. Walmart is currently using grain-based 15 pricing.</p> <p>16 Q. But in 2009 in this email, is there any 17 reference to grain-based pricing?</p> <p>18 A. There was ongoing discussion of 19 producers moving from a market-based pricing to a 20 grain-based model.</p> <p>21 Q. How did it come to your attention -- 22 strike that. I think I've already discussed that. 23 So someone discovered that the prices 24 being charged by Aldi's and Walmart were lower than 25 Krogers' prices in the Columbus KMA; correct?</p>	<p style="text-align: center;">253</p> <p>1 You can answer if you know.</p> <p>2 THE WITNESS: Midwest don't care what 3 the price is. The KMA is the one asking the 4 question.</p> <p>5 BY MS. LEVIN:</p> <p>6 Q. So your suppliers don't care what price 7 you charge for your eggs at retail?</p> <p>8 A. I don't know if they don't care. I'm 9 just saying --</p> <p>10 Q. You just said it.</p> <p>11 A. Well, what I'm saying --</p> <p>12 MR. MURRAY: Excuse me.</p> <p>13 He's trying to explain it, and you cut 14 him off. Please don't do that. Let him finish his 15 answers.</p> <p>16 BY MS. LEVIN:</p> <p>17 Q. Okay. Why -- tell me, would Midwest 18 care -- do your producers care what price Kroger 19 sells its shell eggs at?</p> <p>20 A. They want their supplier -- or their 21 retailers to be competitive, yes.</p> <p>22 Q. So they do care what price Kroger sells 23 its products at?</p> <p>24 A. Right.</p> <p>25 Q. So do your suppliers ever report to you</p>

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<p style="text-align: center;">254</p> <p>1 that your competitors are selling at prices below 2 Krogers' in the market?</p> <p>3 A. I get price checks from suppliers, yes.</p> <p>4 Q. So you get them from both suppliers and 5 from the brokers?</p> <p>6 A. Yes.</p> <p>7 Q. And what do the suppliers ask you to do?</p> <p>8 A. Nothing.</p> <p>9 Q. They just give you the information?</p> <p>10 A. Uh-huh.</p> <p>11 Q. Do they have any particular reason for 12 giving you the information?</p> <p>13 A. Not that I'm aware of.</p> <p>14 Q. And what do you do with the information?</p> <p>15 A. Forward it on to the category management team; but they told me they already get it from Daymon and P.L. Marketing so they really don't need it.</p> <p>16 Q. What is -- you said that price is set by 17 each KMA; and then the division has a certain amount 18 of ability to deviate from that.</p> <p>19 Do you know what factors the KMA takes 20 into account in setting prices?</p> <p>21 A. Well, yes, I do. And just to clarify it, the division answers to the KMA, not the KMA to</p>	<p style="text-align: center;">256</p> <p>1 Q. As to whether they want what? What do 2 you mean, it depends on their KMA strategy?</p> <p>3 A. Well, if -- say Walmarts or Aldi is running them at \$1.49 a dozen, their true cost is \$1.60, they may opt to run them at a price point lower than that to be competitive in the marketplace.</p> <p>4 Q. How often does each KMA set its retail 5 prices for shell eggs?</p> <p>6 A. They change weekly.</p> <p>7 Q. And that will take into account whatever 8 sorts of specials competitors may be running?</p> <p>9 A. Yes.</p> <p>10 Q. Is the -- you mentioned a retail pricing 11 strategy. Is that set by each KMA?</p> <p>12 A. It can be set by corporate, as well as have a KMA twist on it.</p> <p>13 Q. What is a retail pricing strategy?</p> <p>14 A. Retail pricing strategy may be something like the -- to be at X percent over a certain competition. So basically, they won't price the eggs off the cost. They'll price them off what their competition is running them at.</p> <p>15 Q. So a KMA may have a strategy of being 16 2 percent above Walmart?</p>
<p style="text-align: center;">255</p> <p>1 the division.</p> <p>2 So the KMA -- the divisions may have -- a division in a KMA may have a lower cost; but it's determined by the KMA.</p> <p>3 The way you stated it made it sound like 4 it was in reverse.</p> <p>5 The things they take into account, they 6 take fixed costs, variable costs, freight, coming 7 through the warehouse, going to stores, to come up 8 with the margin that needs to be covered in -- not 9 only with the cost of eggs, but the cost of 10 warehousing and distribution and the fixed variable 11 costs in the stores to come up with the total cost 12 of product.</p> <p>13 Q. And that data is all rolled up on a KMA 14 basis?</p> <p>15 A. Yes.</p> <p>16 Q. Does the KMA take into account what the 17 competition is doing?</p> <p>18 A. Yes.</p> <p>19 Q. How is that taken into account?</p> <p>20 A. It depends on the pricing program. They may choose to be one or two cents or 10 cents over the competition. At a certain price point it's -- it all depends on what their KMA strategy is.</p>	<p style="text-align: center;">257</p> <p>1 A. Yes.</p> <p>2 Q. And another KMA may have a strategy of 3 being 10 percent below Acme?</p> <p>4 A. Yes, depending on what market area they're in. If they're in Texas it may be an HEB --</p> <p>5 Q. Right.</p> <p>6 A. -- that they're pricing against.</p> <p>7 In the east it may be a Walmart. Out west it may be a Vons or a Stater's.</p> <p>8 Q. The competition, the types of 9 competition that Kroger faces vary depending upon 10 what section of the country you're in; correct?</p> <p>11 A. Correct.</p> <p>12 Q. Because it depends on what other retail 13 chains have stores in that area; correct?</p> <p>14 A. Correct.</p> <p>15 Q. Are KMAs given any sort of profit margin 16 for shell eggs that they need to achieve?</p> <p>17 A. No.</p> <p>18 Q. Any sort of contribution to overall 19 corporate profits that need to be achieved?</p> <p>20 A. Remember, we went back and talked about the 064 category?</p> <p>21 Q. Right.</p> <p>22 A. It's evaluated as that.</p>

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<p style="text-align: right;">258</p> <p>1 Q. So the profitability is evaluated on the 2 basis of the entire category? 3 A. Yes. 4 Q. So if you are able to, for whatever 5 reason, sell your hash browns at a particularly, 6 particularly above-market price, you might be able 7 to sell your shell eggs at a lower price and still 8 have the category contribute whatever profit margin 9 is desired? 10 MR. MURRAY: Object to the form of the 11 question. 12 BY MS. LEVIN: 13 Q. Is that correct? 14 A. Seems logical. 15 Q. So is the 064 category given some sort 16 of profit margin that it needs to achieve? 17 A. I do not know. 18 Q. Has the policy of pricing being set by 19 KMA been in place for the entire time that you have 20 been in charge of shell egg procurement? 21 A. It was probably in place ever since 22 Kroger was formed. 23 Q. So certainly for the duration of 24 whatever anybody would think is the relative time 25 period in this case, pricing for shell eggs has been</p>	<p style="text-align: right;">260</p> <p>1 A. Well, they have separate warehouses 2 west; but the bulk of the egg products go out of 3 CIW. 4 Q. So when you say that the pricing for egg 5 products is more consistent, do you mean there's a 6 single price throughout the country for egg 7 products? 8 A. There's a single cost for egg 9 products -- 10 Q. Okay. 11 A. -- in all the egg products going out of 12 CIW. 13 Okay? There may be a -- an incremental 14 different cost, if it's coming out of the Fred 15 Meyers or QFC, based on location and logistics. 16 Q. So there's a, an identical cost for all 17 egg products, but what about the retail price to the 18 consumer? Is that set on a KMA-by-KMA basis? 19 A. Yes, it is. 20 Q. So one KMA may have one price for Egg 21 Beaters 8 ounces, and another KMA may have a 22 different price for that same product? 23 A. Correct. 24 Q. And is your testimony with respect to 25 the ability of a division to deviate from that based</p>
<p style="text-align: right;">259</p> <p>1 determined on, in the sole discretion of each KMA? 2 A. Correct. Every KMA has a different 3 pricing. 4 Q. Right. And a different pricing 5 strategy? 6 A. And a different pricing strategy. 7 Q. And faces different competition that it 8 has to respond to? 9 A. Yes. 10 Q. What about for egg products? Do you 11 know how pricing is done for egg products? 12 A. I think pricing for egg products is more 13 consistent since it's priced -- it goes out the CIW 14 warehouse, so they have more a uniform price and 15 it's not priced weekly. 16 Q. What is the CIW warehouse? 17 A. It's Consolidated Interstate Warehouse, 18 which distributes to 31 different states out of a 19 central warehousing system. 20 Q. There's a single warehouse for egg 21 products for all Kroger stores? 22 A. All Krogers -- yes, east and most of the 23 west. 24 Q. Is there another warehouse for some 25 other portion of the west?</p>	<p style="text-align: right;">261</p> <p>1 on competition also true for egg products? 2 A. KMA, yes. And akin to -- they can 3 deviate within the KMA by division if they so 4 choose. 5 Q. And that is based on some sort of 6 meeting-the-competition type situation? 7 A. Yes. 8 Q. Now, did I understand you to say that 9 pricing for egg products is not done on a weekly 10 basis but some other kind of basis? 11 A. It's more of a flat cost. 12 Q. Well, I understand it's more of a flat 13 cost, but does that translate into pricing remaining 14 constant? 15 A. It's more consistent. It's not priced 16 weekly. 17 Q. Do you know how often it is priced? 18 A. I don't know when -- the last time egg 19 products had a change in cost structure. 20 Q. You said that each KMA may have a 21 different pricing strategy; correct? 22 A. Yes. 23 Q. So they may have a different percentage 24 markup for the eggs that they sell? One KMA may 25 have a different percentage markup than another KMA;</p>

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<p style="text-align: right;">262</p> <p>1 correct?</p> <p>2 A. Yes.</p> <p>3 Q. Do you know how often price checks of</p> <p>4 competitors are done?</p> <p>5 A. I do not.</p> <p>6 Q. Would the competitors for whom prices</p> <p>7 are checked vary by KMA?</p> <p>8 A. Yes.</p> <p>9 Q. Because the competitors vary by KMA;</p> <p>10 correct?</p> <p>11 A. Yes.</p> <p>12 Q. Would the decision to offer eggs as a</p> <p>13 loss leader be one that's made by KMA?</p> <p>14 A. Yes.</p> <p>15 Q. And then within a division, a division</p> <p>16 within a KMA might propose to offer eggs as a loss</p> <p>17 leader?</p> <p>18 A. Remember, the KMA makes the decision.</p> <p>19 They may differ it for different parts of the</p> <p>20 division.</p> <p>21 Q. But the division may request the ability</p> <p>22 to offer eggs as a loss leader.</p> <p>23 A. It could, yes.</p> <p>24 Q. It would still require KMA approval; is</p> <p>25 that correct?</p>	<p style="text-align: right;">264</p> <p>1 formulas and procurement contracts?</p> <p>2 A. It's pricing metrics, yes.</p> <p>3 Q. And then there is a column headed</p> <p>4 "Advantages."</p> <p>5 Do you understand that column to provide</p> <p>6 the advantages of the various pricing metrics for</p> <p>7 procurement contracts?</p> <p>8 A. I do.</p> <p>9 Q. And then the next column is</p> <p>10 "Disadvantages." Does that column list</p> <p>11 disadvantages for the various pricing metrics for</p> <p>12 procurement contracts?</p> <p>13 A. It does.</p> <p>14 Q. And then there's a list of "Divisions</p> <p>15 Utilizing." Do you see that column?</p> <p>16 A. Yes.</p> <p>17 Q. And that column lists the divisions as</p> <p>18 of the date of Exhibit 55 that were using the</p> <p>19 various pricing metrics in the first column of</p> <p>20 Exhibit 55.</p> <p>21 A. I see that, but I don't agree with it.</p> <p>22 Q. Well, if this were dated prior to 2006</p> <p>23 when you took over egg procurement, would you</p> <p>24 disagree with it?</p> <p>25 A. I don't know what the date is on there.</p>
<p style="text-align: right;">263</p> <p>1 A. Yes.</p> <p>2 MS. LEVIN: Let's mark as Exhibit 55 a</p> <p>3 document bearing Bates No. KRGEGED00015761 through</p> <p>4 62.</p> <p>5 (Kroger Exhibit 55 was marked for</p> <p>6 identification.)</p> <p>7 (Pause.)</p> <p>8 BY MS. LEVIN:</p> <p>9 Q. Have you had a chance to review</p> <p>10 Exhibit 55?</p> <p>11 A. Yes, I did.</p> <p>12 Q. Do you know what Exhibit 55 is?</p> <p>13 A. I do not.</p> <p>14 Q. When it talks at the top of the page</p> <p>15 about egg pricing strategy, do you know whether it's</p> <p>16 talking about retail pricing or procurement pricing?</p> <p>17 A. I do not.</p> <p>18 Q. On the left-hand side of the page</p> <p>19 there's a heading, "Pricing Model," and it has</p> <p>20 several boxes, one of which is "Market Pricing,"</p> <p>21 Market Differential," "Market Sliding Scale," and</p> <p>22 "cost-plus."</p> <p>23 Do you see that?</p> <p>24 A. Yes, I do.</p> <p>25 Q. Are those references to types of pricing</p>	<p style="text-align: right;">265</p> <p>1 From my knowledge based on what was being done, I</p> <p>2 don't understand this document.</p> <p>3 Q. Well, then, the last column is</p> <p>4 "Retailers Utilizing."</p> <p>5 A. I see that.</p> <p>6 Q. Do you understand what it is that the</p> <p>7 retailers are utilizing?</p> <p>8 A. Well, I understand the chart.</p> <p>9 Q. Okay. Why don't you tell me what you</p> <p>10 understand about the chart?</p> <p>11 A. One thing I don't understand -- the</p> <p>12 first thing that I don't understand is how they're</p> <p>13 differentiating between market pricing and market</p> <p>14 differential.</p> <p>15 Q. So you don't understand those two</p> <p>16 pricing models to be different?</p> <p>17 A. No, I do not. But I do understand</p> <p>18 market pricing versus -- market sliding scale versus</p> <p>19 cost-plus. That I do understand.</p> <p>20 I don't know how they're differentiating</p> <p>21 between the first two and where they say HEB is</p> <p>22 market pricing. Market differential is Walmart,</p> <p>23 Marsh, Albertson's and Safeway. And then market</p> <p>24 sliding scale is Smith, Intermountain and Safeway</p> <p>25 Utah. And cost-plus is Pathmark and our eastern</p>

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<p style="text-align: right;">266</p> <p>1 KMAs. 2 Q. I guess the confusion I have is this -- 3 and I don't know if you can clear it up or not. 4 The pricing models on the left-hand side 5 of the page are pricing models for procurement by 6 retailers; correct? 7 A. Yes. 8 Q. And on the right-hand side we have the 9 retailers that are presumably utilizing that 10 particular pricing metric; correct? 11 A. That's what it says. 12 Q. And then we also have the Kroger 13 divisions that purportedly, at the time of this 14 contract, are utilizing that particular pricing 15 metric; correct? 16 MR. MURRAY: Object to the form of the 17 question. 18 THE WITNESS: That's what it says. 19 BY MS. LEVIN: 20 Q. Do you have any thought on how Kroger 21 would come to know what pricing methodology Pathmark 22 is using in its contracts? 23 A. I can't even validate that this is true. 24 Q. Well, I understand that. But somebody 25 put it together, based on something.</p>	<p style="text-align: right;">268</p> <p>1 up 3.1 percent, and the remaining market went down 2 15.6 percent; is that correct? 3 A. Correct. 4 Q. How does Kroger get information on the 5 remaining market sales of shell eggs? 6 A. I would tend to think -- the only way I 7 know they would do that is Nielsen, which would have 8 that data. 9 Q. Right. 10 MS. LEVIN: Let's mark as Exhibit 56 a 11 document bearing Bates No. KRGEGTD -- a whole bunch 12 of zeros and 7. And I believe this document was 13 produced in native format, so it's many pages long. 14 But it only has one Bates number. 15 (Kroger Exhibit 56 was marked for 16 identification.) 17 BY MS. LEVIN: 18 Q. Mr. Klump, are you able to tell me what 19 Exhibit 56 is? 20 A. I am not. 21 Q. Do you know what the headings across the 22 top refer to? 23 A. Yes, I do. 24 Q. What is store number? 25 A. Store number, every KMA store in that</p>
<p style="text-align: right;">267</p> <p>1 Do you know? 2 A. That doesn't mean it's true. 3 Q. Well, I understand that. But do you 4 have any thoughts on how somebody at Kroger would 5 have information on how Pathmark is -- what pricing 6 methodology Pathmark is using in its procurement 7 contracts? 8 A. I do not. 9 Q. Do you understand the information on the 10 backside of the second page of Exhibit 55? 11 A. I'm not sure if I fully understand it. 12 I see what they're saying. I don't know what 13 they're trying to portray. 14 Q. Well, on the first line for Atlanta 15 division, you've got the pricing model market 16 differential. We don't know whether that's true or 17 not. 18 And then it says [reading]: Volume 19 sales, percent change year ago, year to date 20 June 12; right? 21 So is that telling us that Krogers' 22 sales went up 12.9 percent and the remaining market 23 went down 7.2 percent? 24 A. Yes, it is. 25 Q. And in Cincinnati, Krogers' sales went</p>	<p style="text-align: right;">269</p> <p>1 KMA have a store number. 2 Q. So this is store No. 112 in some KMA? 3 A. In a KMA, yes. 4 Q. Each KMA might have a store number 112? 5 A. Could, yes. 6 Q. And date of purchase. 7 Do you know what that's a reference to? 8 A. The date the eggs were purchased. 9 Q. And does this appear to be some sort of 10 transaction data of sales of eggs by store 11 number 112 on May 1st through May 21st, 2012? 12 A. Yes. 13 Q. And it appears that the first page is 14 all Grade A large eggs 12 count; correct? 15 A. No. 16 Q. What -- 17 A. There's some mediums in there as well. 18 Q. On the first page? 19 A. Uh-huh. First two -- 902s. 20 Q. I'm sorry, I see. The first two are 21 mediums, and then the rest are large; correct? 22 A. That's correct. 23 Q. What is RPC? 24 A. RPC is reusable plastic container. 25 Q. So that's a reference to the packaging;</p>

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<p>270</p> <p>1 correct?</p> <p>2 A. Yes.</p> <p>3 Q. And then "Spending," under the spending</p> <p>4 column, it appears that the medium eggs are a dollar</p> <p>5 59 and the large eggs are a dollar 69; is that</p> <p>6 correct?</p> <p>7 A. That's what the document states.</p> <p>8 Q. And then there's quantity, 1. So that</p> <p>9 would be one 12-count carton; correct?</p> <p>10 A. Yes.</p> <p>11 Q. And then there's a column, "Discount."</p> <p>12 A. Yes.</p> <p>13 Q. Which has 69 cents in it periodically.</p> <p>14 Do you know what that refers to?</p> <p>15 A. I do not.</p> <p>16 Q. On occasion -- at one particular</p> <p>17 location, two or three locations, the discount is</p> <p>18 10 cents. Do you know why there's some sales with a</p> <p>19 69-cent discount and others with a 10-cent discount?</p> <p>20 A. I do not.</p> <p>21 MS. LEVIN: Let's mark as Exhibit 57 --</p> <p>22 do you know who could explain Exhibit 56 for us?</p> <p>23 THE WITNESS: I've never seen this type</p> <p>24 of ledger and why anybody would print out something</p> <p>25 with quantities of one, when we sell a million units</p>	<p>272</p> <p>1 A. A KMA -- if I say division 11, that's a</p> <p>2 KMA.</p> <p>3 Q. That is a KMA. Okay.</p> <p>4 A. Okay? There's different zones or</p> <p>5 different divisions in a KMA as well, but if you see</p> <p>6 something that says division, it's talking KMA.</p> <p>7 Q. It means KMA?</p> <p>8 A. Yes, okay.</p> <p>9 Q. Just to help us all.</p> <p>10 And the week ending date is the --</p> <p>11 presumably the -- exactly that.</p> <p>12 A. Yes. It's talking about the week that</p> <p>13 it was -- yes.</p> <p>14 Q. And what is the UPC number?</p> <p>15 A. Consumer UPC.</p> <p>16 Q. And each product has a separate UPC</p> <p>17 number?</p> <p>18 A. It does.</p> <p>19 Q. So Kroger Grade A small eggs has a</p> <p>20 different UPC number than Kroger Grade A large eggs?</p> <p>21 A. Correct.</p> <p>22 Q. And Kroger Grade A large eggs has a</p> <p>23 different UPC number than Hilliard Farms large eggs?</p> <p>24 A. Correct.</p> <p>25 Q. Then we've got "Scan Unit Quantity." Do</p>
<p>271</p> <p>1 a week; I would not know.</p> <p>2 MS. LEVIN: Let's mark as Exhibit 57</p> <p>3 document bearing Bates No. KRGEGLTD001. Again, this</p> <p>4 was produced in native format, and I think that's</p> <p>5 why a multi-page document has only one Bates number.</p> <p>6 (Kroger Exhibit 57 was marked for</p> <p>7 identification.)</p> <p>8 (Pause.)</p> <p>9 BY MS. LEVIN:</p> <p>10 Q. Have you had a chance to review</p> <p>11 Exhibit 57?</p> <p>12 A. Yes, I've had a chance to look at it,</p> <p>13 yes.</p> <p>14 Q. Do you know what Exhibit 57 represents?</p> <p>15 A. It looks like it represents some egg</p> <p>16 sales from 12/14/2002 through 5/31/2003.</p> <p>17 Q. And when you say "egg sales," do you</p> <p>18 mean retail sales by Kroger?</p> <p>19 A. Yes.</p> <p>20 Q. What is --</p> <p>21 A. Per unit.</p> <p>22 Q. I was just going to ask you to explain</p> <p>23 the columns across the top. Division?</p> <p>24 A. Division 11.</p> <p>25 Q. And is that a division within a KMA?</p>	<p>273</p> <p>1 you know what that refers to?</p> <p>2 A. Yes.</p> <p>3 Q. What's that?</p> <p>4 A. Those are the scanned units that were</p> <p>5 scanned through the registers for that division,</p> <p>6 Division 11, for that week.</p> <p>7 Q. So looking down at Kroger Grade A small</p> <p>8 eggs, which is about the fifth line down, for the</p> <p>9 week ending December 14th, 2002, there were</p> <p>10 2,540 units scanned?</p> <p>11 A. Yes.</p> <p>12 Q. And those units, we don't know what size</p> <p>13 the unit is?</p> <p>14 A. Yeah, we do. It's a 12 count.</p> <p>15 Q. It's a 12 count? How can you tell it's</p> <p>16 a 12 count?</p> <p>17 A. Because I know that's a 12-count number.</p> <p>18 Q. And then "Scan Cost Amount," what is</p> <p>19 that?</p> <p>20 A. That's the -- what they scanned out the</p> <p>21 register at.</p> <p>22 Q. So that's the price that Kroger</p> <p>23 received?</p> <p>24 A. Charged, yes.</p> <p>25 Q. Charged for the eggs. And would that</p>

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<p style="text-align: right;">274</p> <p>1 include any discount that a consumer might get?</p> <p>2 A. I don't know. I don't know what's all <p>3 rolled into that number.</p> <p>4 Q. And what about "Scan Dollar Amount,"</p> <p>5 do you know what that is?</p> <p>6 A. I do not. This is an old report. I'm <p>7 not sure if the scanned cost amount is the true cost <p>8 of the product and the scanned dollar amount is what <p>9 they actually scan through the register at.</p> <p>10 Q. Well, when you say you're not sure about</p> <p>11 the scanned cost amount, what exactly are you</p> <p>12 saying? You don't know what that is?</p> <p>13 A. I've never seen a report have this <p>14 mis-nomenclature on it.</p> <p>15 Q. Scanned cost amount?</p> <p>16 A. Right.</p> <p>17 Q. But you have seen reports that have</p> <p>18 scanned dollar amount?</p> <p>19 A. Yes.</p> <p>20 Q. What is scanned dollar amount?</p> <p>21 A. The cost that was scanned through the <p>22 register. The retail cost.</p> <p>23 Q. And again, you don't know if the retail</p> <p>24 cost would include any coupon that the consumer</p> <p>25 might have had for some special Kroger was running?</p> </p></p></p></p></p></p>	<p style="text-align: right;">276</p> <p>1 MS. LEVIN: So we won't --</p> <p>2 MR. MURRAY: I would say -- I mean,</p> <p>3 there's no use taking up his time going through</p> <p>4 because this isn't data that he's really familiar</p> <p>5 with. It may even be an old system. So send the</p> <p>6 questions, and we'll handle it that way.</p> <p>7 MS. LEVIN: There are several more from</p> <p>8 different time periods. And as you say, I suspect</p> <p>9 the system changed over time; and I don't see the</p> <p>10 purpose to be served of going through and asking him</p> <p>11 those questions if we can do it another way.</p> <p>12 MR. MURRAY: Uh-huh.</p> <p>13 BY MS. LEVIN:</p> <p>14 Q. I think I just had some cleanup</p> <p>15 questions here.</p> <p>16 One of the topics that I believe you</p> <p>17 said you were prepared to testify on was the -- and</p> <p>18 I'm confused by this, but I think that is what you</p> <p>19 said. Topic 15, any communications with Sparboe</p> <p>20 Farms concerning the process-verified program. Is</p> <p>21 that a topic you're prepared to testify on?</p> <p>22 A. Yes.</p> <p>23 Q. Okay.</p> <p>24 MR. MURRAY: Some of these topics assume</p> <p>25 that there is --</p>
<p style="text-align: right;">275</p> <p>1 A. I do not.</p> <p>2 Q. Can the scanned cost amount be the</p> <p>3 cost -- the price that Kroger paid for the eggs?</p> <p>4 A. Could be.</p> <p>5 Q. What's MFG CD?</p> <p>6 A. I do not know.</p> <p>7 Q. What about MFG DSC TX?</p> <p>8 A. I do not know.</p> <p>9 Q. DPT CD? Do you know what any of the</p> <p>10 other columns mean here?</p> <p>11 A. I do not, no. I mean, the COM CD is the <p>12 class -- remember, we talked 64 class. That's what <p>13 that is.</p> <p>14 And apparently 675 is the natural</p> <p>15 grouping. And the subcategory within that class is</p> <p>16 the last number that you see there.</p> <p>17 But the other nomenclature I'm not</p> <p>18 familiar with.</p> <p>19 MS. LEVIN: We have several more of</p> <p>20 these database printouts that we would like to have</p> <p>21 some explanation for. And I can sit here and ask</p> <p>22 Mr. Klump what he understands the headings to be, or</p> <p>23 we can send you some questions about them as you</p> <p>24 have sent us questions about our transaction data.</p> <p>25 MR. MURRAY: That's fine.</p> </p></p>	<p style="text-align: right;">277</p> <p>1 MS. LEVIN: I understand. There may be</p> <p>2 something to be said.</p> <p>3 MR. MURRAY: We've already established</p> <p>4 that Sparboe was not a supplier to Kroger, so go</p> <p>5 ahead.</p> <p>6 BY MS. LEVIN:</p> <p>7 Q. Did Kroger have any communications with</p> <p>8 Sparboe Farms concerning the process-verified</p> <p>9 program?</p> <p>10 A. It did.</p> <p>11 Q. And what communications did you have</p> <p>12 with Sparboe on that subject?</p> <p>13 A. I had a meeting with Sparboe, came to <p>14 corporate and explained their new process verified <p>15 program and wanted us to consider them as a <p>16 potential supplier in the future.</p> <p>17 I declined and said that we were</p> <p>18 sticking with our UEP as our standard animal welfare</p> <p>19 program; and that at this point I wouldn't be</p> <p>20 interested.</p> <p>21 Q. And why were you not interested?</p> <p>22 A. Because the program that we adopted to <p>23 follow, which we felt was the industry's best <p>24 practice for the time was the UEP. And that's what <p>25 we felt was the best standard, so therefore, we're</p> </p></p></p></p></p></p>

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<p style="text-align: right;">278</p> <p>1 going to stay with it. 2 Q. And do you recall when you had this 3 conversation with Sparboe Farms? 4 A. Exact date, no. 5 Q. Did you have any other suppliers 6 approach you with alternative animal welfare 7 programs that they would like for you to consider? 8 A. No. 9 Q. Does Kroger prepare any forecasts for 10 the demand for shell eggs? 11 A. Explain what you mean by a forecast. 12 Q. Well, I think you told us today that 13 when you sent out an RFQ, you had some sort of 14 suggestion, it wasn't binding but some sort of 15 suggestion by KMA as to the quantity of eggs that 16 would be purchased during the course of the year for 17 that particular KMA; correct? 18 A. We have the previous year's volume that 19 we list. 20 Q. That's -- and all you list is the prior 21 year's volume? 22 A. Yes. 23 Q. Does Kroger do anything else to attempt 24 to forecast demand for shell eggs? 25 A. We try to forecast features, and -- in</p>	<p style="text-align: right;">280</p> <p>1 looks at the current market cost compared to the 2 feature cost -- 3 Q. Right. 4 A. -- to see, you know, because that's 5 going to make a big impact on -- if the market is at 6 a dollar 69 and we run a 10 for 10 feature, you're 7 going to have a much greater lift than if the market 8 is a dollar 10 and you would run a 10 for 10. 9 Q. Does Kroger look at anything besides 10 past sales to project what future demand might be? 11 A. As far as I know, no. 12 Q. When we were talking about pricing by 13 KMA for shell eggs, did the description you gave of 14 retail pricing by KMA apply to specialty eggs as 15 well? 16 A. Specialty eggs fall under the natural 17 group, and they're more autonomous. They're more 18 centrally controlled. And, perfectly honest, I know 19 they're a more coordinated category. But as far as 20 the pricing behind it, they tend to be more 21 consistent. 22 So I don't know if that's being driven 23 by the corporate group with KMA influence or if the 24 corporate group has control of that. 25 Q. When you say they're more coordinated</p>
<p style="text-align: right;">279</p> <p>1 advance of the feature and give them an idea what we 2 estimate the lift would be for that feature. 3 Q. So to make sure I understand all the 4 terms you're using, if Kroger is going to run a 5 feature of some sort, a -- two dozen eggs for \$4 6 type feature -- 7 A. Yes. 8 Q. -- you try to forecast how much 9 increased demand that might stimulate? 10 A. Yes. We have a system called ESP, which 11 they upload the price point, the current market 12 price, the forecasted feature price, and what it 13 does is go back and search data, trying to find a 14 similar situation, and looks at the percent lift, or 15 the increased sales that we would receive off of 16 that. 17 And then we communicate that to the 18 producer as an estimate, estimate what we believe 19 future sales would be. 20 Q. So if you're planning to run a two for 21 \$4 special, you might look back through your system 22 to last year to see if you ever ran a similar 23 special and look at what percentage increase in egg 24 sales that brought about? 25 A. Yes. It looks at that, and it also</p>	<p style="text-align: right;">281</p> <p>1 and more consistent, coordinated with what and 2 consistent with what? 3 A. If they would opt to run a feature on 4 Simple Truth eggs, it is not -- it cannot be 5 scrutinized by the KMA division. It's exercised in 6 all divisions. 7 Q. It's a corporate mandate? 8 A. I wouldn't say a mandate. It's -- the 9 natural group is controlled by the corporate office 10 without -- with not as much KMA influence. 11 Q. So does the corporate office set the 12 price for the specialty eggs? 13 A. Yes. 14 Q. And each KMA has to follow that price? 15 A. Yes. 16 Q. Does the corporate office set the same 17 price for specialty eggs across all KMAs? 18 A. No. 19 Q. So the corporate office may set one 20 price for specialty eggs in the Atlanta division and 21 a different price in the south central? 22 A. Yes, depending on what the input costs 23 are. 24 Q. And is the pricing for specialty eggs 25 driven as well by costs?</p>

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<p style="text-align: right;">282</p> <p>1 A. Yes. 2 Q. By your input costs? 3 A. Yes. 4 Q. And are any other factors taken into 5 account? 6 A. As far as I know, no. 7 Q. If there are specials run on -- well, 8 are there ever specials run on specialty eggs? 9 A. Yes. 10 Q. Are those also determined by the 11 corporate office? 12 A. Yes. 13 Q. But there might be a special that would 14 be run in one KMA and not in another KMA? 15 A. Depending on supply, yes. 16 Q. Does competitor pricing also figure into 17 the pricing of specialty eggs? 18 A. Not as much as retail shell eggs. 19 Q. But there is a factor relating to 20 competitive pricing? 21 A. I have never heard it come up in the 22 discussion, so I'd have to say I don't know. 23 Q. Are there different competitors for 24 Kroger for specialty eggs than for other 25 nonspecialty shell eggs?</p>	<p style="text-align: right;">284</p> <p>1 violated the Sherman Act as alleged in its 2 Complaint. 3 Can you tell me what factual basis you 4 have for any allegation that any of the defendants 5 have violated the Sherman Act? 6 MR. MURRAY: Objection; calls for a 7 legal conclusion. 8 You can answer if you know, but . . . 9 THE WITNESS: I don't know. 10 BY MS. LEVIN: 11 Q. Do you know what practices are being 12 challenged by the Complaint? 13 A. I read the deposition, yes. 14 Q. You read what deposition? 15 A. The Complaint and the -- which one was 16 it? 17 Is this it? 18 MR. MURRAY: That's the Second Amended 19 Complaint. 20 MS. LEVIN: If your answer is simply 21 that you read the allegations in the Complaint -- 22 THE WITNESS: Right here. 23 MR. MURRAY: Yeah. 24 THE WITNESS: Yes. 25 BY MS. LEVIN:</p>
<p style="text-align: right;">283</p> <p>1 A. Yes. 2 Q. Who are the competitors for specialty 3 eggs? 4 A. Eggland's Best is a major competitor in 5 that arena. Land O' Lakes, Happy Egg, any local -- 6 specialty eggs, you tend to get more of a local 7 pressure than you do as much as a national pressure. 8 There's very few major national players 9 out there, Eggland's Best and Land O' Lakes being 10 the two bigger ones. But you'll get the local 11 organic farm or the local cage-free farm offering 12 SKUs in the store that compete with that -- the 13 Simple Truth brand. 14 Q. And are those local competitors selling 15 through stores such as Whole Foods or Trader Joe's, 16 or do they sell through the Safeway type stores of 17 the world? 18 A. I don't know. 19 THE VIDEOGRAPHER: Counsel, I have about 20 nine minutes left on this tape. 21 MS. LEVIN: Okay. 22 BY MS. LEVIN: 23 Q. You were designated as Topic -- for 24 Topic 32, which is Krogers' awareness and 25 understanding of any of the activity it contends</p>	<p style="text-align: right;">285</p> <p>1 Q. Then that's the only factual basis you 2 have for the Complaint is the Complaint itself? 3 A. Yes. 4 Q. You know nothing beyond what's alleged 5 in the Complaint? 6 A. Correct. 7 Q. Have you had any discussions with 8 anybody within Kroger about the allegations of the 9 Complaint, other than the law department? 10 A. No. 11 Q. I don't have any -- well, you've been 12 referring to some notes today, I believe? Is that 13 correct? 14 A. Yes. 15 Q. And those notes have helped refresh your 16 recollection as to your testimony? 17 A. Yes. 18 MS. LEVIN: I'd like to -- 19 MR. MURRAY: Do you want to mark those 20 as an exhibit? 21 MS. LEVIN: -- mark those as -- 22 MR. MURRAY: I'd ask that you make a 23 copy for me. You can mark it, and when he changes 24 the tape, go make a copy for me. Why don't you just 25 mark it now and let's go off the tape.</p>

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<p style="text-align: center;">286</p> <p>1 Well, she'll put a sticker on it, and 2 you take that out at the break, make a copy for me. 3 4 MS. LEVIN: Mark it, and let's just get his testimony as to what it is. 5 (Grocery Exhibit 58 was marked for 6 identification.)</p> <p>7 BY MS. LEVIN: 8 Q. We've marked as Exhibit 58 some 9 handwritten notes. Mr. Klump, are those your 10 handwritten notes?</p> <p>11 A. Yes, they are. 12 Q. And what are they handwritten notes of? 13 A. They are on questions that I would be deposed on, a list of the documents that I reviewed, and the people I talked to.</p> <p>14 MS. LEVIN: I don't have any further 15 questions; but we'll change the tape, because I think some of those on the phone do. 16 MS. CRABTREE: Rose Acre will have just 17 a couple. 18 THE VIDEOGRAPHER: We're going off the record at 17:13. This is the end of Disk 4. 19 (Recess taken.) 20 THE VIDEOGRAPHER: We are going back on record. Time on video is 17:20. This is the</p>	<p style="text-align: center;">288</p> <p>1 defendants in this action? 2 A. Yes, I am. 3 Q. How did you become aware of that? 4 MR. MURRAY: And if it's information you 5 learned from lawyers, either at Kroger or from 6 outside counsel, it's a -- you can identify that, 7 but that's as much as you can do. 8 THE WITNESS: Okay. I was identified -- 9 or was told by the Kroger lawyers -- (Simultaneous cross-talk.) 10 MS. CRABTREE: Pardon? 11 MR. MURRAY: He just answered it. 12 BY MS. CRABTREE: 13 Q. Did anyone from Rose Acre reach out to you about this counterclaim? 14 A. Not that I'm aware of. 15 Q. So you didn't talk to anyone from Rose Acre Farms about the counterclaim before it was filed? 16 A. No. 17 Q. What's your understanding of the counterclaim, other than what's been given to you by your lawyers? 18 MR. MURRAY: If the only understanding you have is what you've been told by your lawyers, I</p>
<p style="text-align: center;">287</p> <p>1 resumption of Disk 4. 2 EXAMINATION 3 BY MS. CRABTREE: 4 Q. This is Molly Crabtree, counsel for Rose 5 Acre Farms. I just have a couple of follow-up 6 questions for you. 7 Could you please turn back to Exhibit 55 8 in front of you. 9 MS. LEVIN: Should be near the top. 10 BY MS. CRABTREE: 11 Q. It's just a single piece of paper. 12 A. Okay, I have it. 13 Q. And you testified you didn't know where 14 this information came from; is that correct? 15 A. That's correct. 16 Q. Who is Kathy Book? 17 A. Kathy Book was the category manager for 18 dairy. 19 Q. And the information produced with this 20 document indicates that Kathy Book is the custodian 21 of this document. Would that surprise you that she 22 would have this type of information? 23 A. No. 24 Q. Okay. Are you aware of a counterclaim 25 that's been filed against Kroger by some of the</p>	<p style="text-align: center;">289</p> <p>1 instruct you not to reveal any of that information. 2 MS. CRABTREE: And I would ask the 3 witness to reveal any facts that were given to him 4 by his lawyers, no advice. 5 THE WITNESS: That there was a 6 counterclaim filed. 7 MR. MURRAY: That's it. 8 BY MS. CRABTREE: 9 Q. Have you reviewed the counterclaim? 10 A. Was it in the packet? 11 No. 12 MS. CRABTREE: That's all I have for 13 you. Thank you, Mr. Klump. 14 THE WITNESS: Thank you. 15 MR. NOVAK: Does that mean I'm up? 16 MR. MURRAY: Think so. 17 MS. LEVIN: Yes. 18 MR. MURRAY: There's no other defendants 19 who are asking questions; is that correct? 20 EXAMINATION 21 BY MR. NOVAK: 22 Q. Mr. Klump, you referred a couple times 23 today to the phrase "true cost of the product" or 24 "total cost of goods" or words to that effect. 25 Can you explain to me what the different</p>

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<p style="text-align: right;">290</p> <p>variables in comprising the true cost of the product as it relates to shell eggs are?</p> <p>A. Well, I believe the reference I was using in the cost-plus model as being the true cost of product versus the market.</p> <p>Basically it takes into account the feed costs, the variable, the fixed costs and -- of the product that's being sold to the retailer.</p> <p>Q. Okay. Maybe I'm thinking of a different term that you used, but at one time you talked about the cost of the product that Kroger viewed at the category level to determine what profit margin they were obtaining on the product.</p> <p>Can you list for me the variables that Kroger looked at for purposes of calculating its cost of product at the category level.</p> <p>A. Yes. What I was referring to there is the total cost of the product is a cost of -- or the cost that we pay producers is a cost delivered to our warehouse. We have warehousing expenses that we incur, along with freight to the stores, as long as the variable costs in operating the stores and the fixed costs of the stores to comprise what the total cost of the product would be at shelf.</p> <p>Q. And then for purposes of pricing at</p>	<p style="text-align: right;">292</p> <p>A. I would say they're probably in the 60 to 70 percent range.</p> <p>Q. Okay. So it would be difficult to hit the profit margin for the category without hitting the profit margin for eggs, would it not?</p> <p>A. Yes.</p> <p>Q. And has Kroger typically hit the profit margin of the category over the last several years?</p> <p>MS. LEVIN: I'll object to the form.</p> <p>THE WITNESS: I do not know. There's 18 KMAs, and each one has their own different margin for that category.</p> <p>BY MR. NOVAK:</p> <p>Q. Now, you've spoken a little about particular instances where Kroger ran specials or features on shell eggs as a loss leader.</p> <p>When Kroger makes a determination to price their eggs in that manner, how do they go about doing it?</p> <p>A. That's the side at KMA level. I do not know.</p> <p>Q. Okay. Is the cost of the product one of the factors in setting a loss leader price for the product?</p> <p>A. Absolutely.</p>
<p style="text-align: right;">291</p> <p>retail, does Kroger attempt to have a target profit margin that is added to that total cost of product in each of its KMAs?</p> <p>A. Kroger looks at the 064 category profit margin, and they try to take the different items in that category to make up what the needed profit margin would be for the 064 category.</p> <p>Q. What is the profit margin that Kroger attempts to receive at that category level?</p> <p>A. They don't share that with me.</p> <p>Q. All right. And that 064 category is comprised of eggs, hash browns, and muffins?</p> <p>A. Eggs, potatoes, and muffins.</p> <p>Q. Okay. And in terms of the relative contribution -- I'm trying to get a feel for what portion in terms of dollar volume each of those product lines is in the 064 category.</p> <p>Do you have a rough feel for that?</p> <p>A. An exact feel, no. But eggs are the major portion of that category.</p> <p>Q. Would you say they're over half of the dollar volume in that category?</p> <p>A. Yes.</p> <p>Q. Even over 75 percent of the dollar volume of the category?</p>	<p style="text-align: right;">293</p> <p>Q. So even in instances when the product is priced at a loss, the total cost of the goods to Kroger remains a factor in how the product is priced?</p> <p>A. Correct.</p> <p>Q. You had testified earlier today that Kroger reviews the competitiveness of its pricing at retail; and one of the sources of information for that are the reports that you receive from your different suppliers.</p> <p>I'd like to -- is the court reporter there and has folder No. 2? I'd like to mark the document in folder No. 2 as an exhibit.</p> <p>(Kroger Exhibit 59 was marked for identification.)</p> <p>(Discussion off the stenographic record.)</p> <p>BY MS. LEVIN:</p> <p>Q. Mr. Klump, you can take a moment to review document 59 -- or Exhibit 59. And then let me know when you're ready to...</p> <p>MS. LEVIN: For the record, to make sure everybody's looking at the same thing, it's Bates numbered KRGEGED0004749 through -- again, this must be something that was produced in native format. It</p>

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<p style="text-align: right;">294</p> <p>1 has several pages. But the others don't have Bates 2 numbers.</p> <p>3 THE WITNESS: Okay, I'm ready.</p> <p>4 BY MR. NOVAK:</p> <p>5 Q. Yeah, the other three pages should, at 6 the top left-hand corner, have a Bates number ending 7 in 4750, and it was a spreadsheet, I believe 8 produced in native format.</p> <p>9 MR. MURRAY: They do.</p> <p>10 MS. LEVIN: You're right.</p> <p>11 BY MR. NOVAK:</p> <p>12 Q. Mr. Klump, would you receive from Moark 13 occasional retail price audits?</p> <p>14 A. I do.</p> <p>15 Q. Is Deposition Exhibit 59 an example of 16 that type of price audit is received by Moark?</p> <p>17 A. It is.</p> <p>18 MS. LEVIN: Received by Moark?</p> <p>19 THE WITNESS: I'm sorry.</p> <p>20 BY MR. NOVAK:</p> <p>21 Q. I'm sorry, that was received by Kroger 22 from Moark.</p> <p>23 A. Yes, it is.</p> <p>24 MR. NOVAK: And thank you for the 25 correction.</p>	<p style="text-align: right;">296</p> <p>1 a higher cost of product attributable to using a 2 cost-plus formula in its acquisition of the product, 3 would it reduce its costs in order to compete with 4 the other retailers?</p> <p>5 MS. LEVIN: I'll object to the form.</p> <p>6 MR. MURRAY: Did you hear the question?</p> <p>7 Did you want it read back?</p> <p>8 THE WITNESS: No.</p> <p>9 Yes, they would. It's up to the KMA 10 whether they want to compete at that level or at a 11 competitive -- a competitive higher cost.</p> <p>12 BY MR. NOVAK:</p> <p>13 Q. And on the flip side, in those instances 14 where Krogers' total cost of product was less than 15 its competitors as a result of using a cost-plus 16 pricing formula, would it enjoy perhaps some 17 additional profit margin at the retail level?</p> <p>18 A. I'm sure it would.</p> <p>19 Q. Would it necessarily reduce its prices 20 even further, or would it simply, in those occasions 21 where the cost-plus pricing model resulted in Kroger 22 having a lower acquisition cost, just enjoy a higher 23 profit margin?</p> <p>24 A. They would probably do several things. 25 They would probably leave the price consistent and</p>
<p style="text-align: right;">295</p> <p>1 BY MR. NOVAK:</p> <p>2 Q. Attached to the initial page, which was 3 an email from Leesa Campbell addressed to yourself, 4 is a three-page document.</p> <p>5 Can you describe to me what that 6 document is.</p> <p>7 A. The document is the different KMAs in 8 which Moark is the supplier in the pricing of the 9 retail competition in that area.</p> <p>10 Q. Is this some of the information that 11 Kroger takes into account in evaluating the 12 competitiveness of its retail pricing as compared to 13 some of its other retail competitors?</p> <p>14 A. No, it is not. Kroger uses Daymon and 15 P.L. Marketing, which is their two brokers, to 16 source this same type information.</p> <p>17 Q. Irrespective of which source of 18 information they use, Kroger reviews, on a frequent 19 basis, the pricing of its retail competitors to make 20 determinations as to how it would price its product; 21 correct?</p> <p>22 MS. LEVIN: I'll object to the form.</p> <p>23 THE WITNESS: Yes.</p> <p>24 BY MR. NOVAK:</p> <p>25 Q. Now, in those instances where Kroger has</p>	<p style="text-align: right;">297</p> <p>1 run more features to promote new business.</p> <p>2 Q. You were asked some questions about 3 Deposition Exhibit 42. I'd like you to pull that 4 out if you have that, and specifically I want to run 5 through Page 7 of Deposition Exhibit 42.</p> <p>6 A. Okay, I have it.</p> <p>7 Q. Now, I'm looking at the different 8 suppliers in -- broken down in geographic regions 9 that set forth -- are you with me on that Page 7 of 10 Deposition Exhibit 42 that says at the top of the 11 page "Suppliers by Geographic Area"?</p> <p>12 A. I am.</p> <p>13 Q. Okay. I'd like to ask about a couple 14 states in particular.</p> <p>15 If I were a consumer in the state of 16 California purchasing banner eggs at a Krogers or a 17 Ralphs store in California, based on this exhibit, 18 would I have -- would I be purchasing eggs that were 19 provided to Kroger by Norco Ranch?</p> <p>20 A. Northern California --</p> <p>21 MS. LEVIN: Object to the form. Do you 22 have a time frame? You're talking about 2010?</p> <p>23 MR. NOVAK: Yes, 2010, I believe is the 24 date of the document.</p> <p>25 THE WITNESS: Northern California would</p>

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<p style="text-align: right;">298</p> <p>1 be NuCal; Southern California would be Moark. 2 BY MR. NOVAK: 3 Q. Okay. And if I were purchasing eggs in 4 the state of Arizona as a consumer at a Fry's or a 5 Krogers, would Rose Acre be the producer from whom 6 the eggs were provided to Krogers? 7 A. There's two different divisions in the 8 Arizona area, Smith Center Mountain and Fry's. If 9 you purchase them at Fry's stores, it would be Rose 10 Acres. If you were purchasing them at a Smith's 11 store, it would have been Hickman who subcontracted 12 from Moark. 13 Q. Okay. If I were a consumer purchasing 14 in that time period in the state of Kansas, would 15 the supplier have been Cal-Maine? 16 A. Yes, it would. 17 Q. If I were a consumer purchasing in the 18 state of Nevada, would it be Hickman's? 19 A. If it was a Smith store, yes. 20 Q. If I were a consumer purchasing in the 21 state of Utah, would it be Oakdell? 22 A. Yes, it would. 23 Q. How about a consumer in the state of 24 Nebraska? 25 A. You got me. I'm not sure what stores</p>	<p style="text-align: right;">300</p> <p>1 Q. Okay. Some of the suppliers would have 2 changed at a certain point in that year? 3 A. In April -- April of 2011, the supplier 4 to the Atlantic KMA switched from Rose Acres to 5 Midwest Poultry. 6 Q. Okay. 7 A. So the one with Tennessee would be 8 Midwest Poultry in the latter part of the year of 9 Tennessee. The earlier part of the year could be 10 half Midwest Poultry, half Rose Acres. 11 Q. Would the answers to the questions 12 regarding the origin of the supplier have been the 13 same in 2008 as they were in 2010? 14 A. Yes. 15 Q. And how about 2007? 16 A. Yes. 17 Q. 2006? 18 A. Yes. 19 Q. 2005? 20 A. The latter part of 2005, I can say yes. 21 Prior to first part of the year, I'm not aware of 22 any supplier changes. 23 Q. Now, you were providing testimony with 24 respect to the Urner Barry index earlier this 25 afternoon; and one of the things you made reference</p>
<p style="text-align: right;">299</p> <p>1 are in Nebraska. 2 Q. Okay. A consumer in the state of 3 Mississippi, would it be Midwest Poultry? 4 MS. LEVIN: Again, all your questions 5 are for 2010; is that correct? 6 MR. NOVAK: Yes. 7 THE WITNESS: I would say yes. 8 BY MR. NOVAK: 9 Q. How about a consumer in the state of 10 West Virginia? 11 A. Midwest Poultry. 12 Q. A consumer in the state of Tennessee? 13 A. It could either be Midwest Poultry or 14 Rose Acres. 15 Q. And I think the only one I didn't cover 16 is New Mexico. 17 A. That would be Moark subcontracted 18 through Hickman. 19 Q. Okay. Now, would your answers to the 20 questions I just asked be the same for 2009 as they 21 were for 2010? 22 A. Yes. 23 Q. And would the answers be the same for 24 2011 as they were for 2010? 25 A. Depends what part of 2011.</p>	<p style="text-align: right;">301</p> <p>1 to is that there are trades made between different 2 egg producers, the pricing of which is reported to 3 Urner Barry; is that correct? 4 A. Yes. 5 Q. Well, when an egg supplier trades eggs 6 with another egg supplier, is it sometimes possible 7 that the eggs that Kroger purchases from a 8 particular supplier were actually -- were actually 9 produced by a different supplier? 10 MS. LEVIN: I'll object to the form. 11 THE WITNESS: Yes. 12 BY MR. NOVAK: 13 Q. Does that happen frequently? 14 MS. LEVIN: I'll object to the form. 15 THE WITNESS: I'm not sure what you mean 16 by "frequently." It does happen on a frequent 17 occasion; but the volume of eggs compared to the 18 volume that's sold is very small. 19 BY MR. NOVAK: 20 Q. Okay. Have you ever heard the term 21 "commodity eggs"? 22 A. Yes. 23 Q. What does that term mean to you? 24 A. Eggs are a commodity. They're traded on 25 an open market system, you know, with basically</p>

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<p style="text-align: right;">302</p> <p>1 supply dictating the cost of the product. 2 Q. Do you consider them to be 3 interchangeable for purposes of supplies that Kroger 4 purchases? 5 A. Define what you mean by 6 "interchangeable." 7 Q. Well, I'll withdraw that and ask it a 8 little differently. 9 Kroger, as we've been looking at these 10 suppliers at Page 7 of Exhibit 42, uses a number of 11 different suppliers for their banner eggs, and may, 12 for example, have a different producer for the same 13 banner egg product depending on what state the 14 consumer purchases that product from; correct? 15 A. Yes. 16 Q. And Kroger views the egg product as 17 being a sufficiently interchangeable one, that 18 they're not concerned that the supplier was 19 different in California than it was in Michigan or 20 in West Virginia; correct? 21 A. Correct. 22 MR. NOVAK: I'm just going to look 23 through my notes for a quick second. I may be done. 24 THE WITNESS: One thing I want to clear 25 up is that, in our eastern KMA's in the Kroger</p>	<p style="text-align: right;">304</p> <p>1 any point in time was actually below the producer's 2 cost? 3 A. I do not. 4 Q. Okay. Do you have any visibility into 5 your supplier's costs? 6 A. I do not. 7 Q. Can you look at Exhibit 53. It's an 8 unsigned letter from Bob Hodges to Gary Stull dated 9 February 15th, 2005. 10 A. Okay, I have it. 11 Q. Okay. Do you see in there, in the first 12 paragraph where it mentions that, as a result of 13 equalizing prices between divisions, that Moark -- 14 it says -- this move -- the equalization of the 15 price between two divisions will eliminate all 16 margins to Moark on the account? 17 A. Yes, I do. 18 Q. Okay. Do you know whether that 19 statement is factually true? 20 A. I do not. All producers have a 21 different cost of goods, based on their efficiency, 22 their grain buying practices, and everything else. 23 So it's -- without looking at their 24 books, it would be a hard thing to justify. 25 Q. And Kroger doesn't have visibility to</p>
<p style="text-align: right;">303</p> <p>1 division, we have an elevated level of vitamin D in 2 our product, which they don't have in the west. So 3 there is a little difference there. 4 But other than that, the eggs are 5 consistent; and as long as they meet Kroger 6 specifications. 7 MR. NOVAK: Okay, I think that's all the 8 questions I have. 9 MR. MURRAY: I got a couple questions. 10 EXAMINATION 11 BY MR. MURRAY: 12 Q. Do you remember, Mr. Klump, testifying 13 about the ups and downs of the Urner Barry index? 14 A. Yes, sir, I do. 15 Q. And at one point I think you said that 16 sometimes on one of the dips, suppliers might be 17 selling below their cost. Do you remember that? 18 A. Yes, I do. 19 Q. Okay. How would you have known that? 20 A. Just by what the supplier says. I have 21 no factual evidence that say it is below their cost; 22 but they whine and cry when the Urner Barry gets to 23 a certain point, and they say they're losing money. 24 Q. So you have no personal knowledge that 25 they were actually -- that the Urner Barry index at</p>	<p style="text-align: right;">305</p> <p>1 their books? 2 A. I do not, no. 3 Q. Moark's books, right? 4 A. No. 5 MR. MURRAY: Okay. I have no further 6 questions. 7 MS. LEVIN: I have a couple of 8 follow-up. 9 FURTHER EXAMINATION 10 BY MS. LEVIN: 11 Q. Mr. Klump, are you stating that your 12 testimony earlier today with respect to the Urner 13 Barry index dipping below certain suppliers' costs 14 was false? 15 A. No, I'm just saying I was going off what 16 they said, and I have no factual evidence that 17 says -- I didn't visualize that -- I didn't see the 18 fax that said it was. I was going by what they told 19 me, that it was below their cost. 20 Q. So the testimony may have been false 21 earlier today? 22 MR. MURRAY: Object to the form of the 23 question. He's clarified it. 24 BY MS. LEVIN: 25 Q. That was your testimony earlier today,</p>

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<p>1 wasn't it?</p> <p>2 A. Yes, I did say it was below cost, but I</p> <p>3 was going off of what they had told me and not off</p> <p>4 of the -- a -- if somebody says can you verify that</p> <p>5 100 percent that it was below cost, I'd have to say,</p> <p>6 no, I do not have the facts that says it was. Just</p> <p>7 that they told me it was below their cost.</p> <p>8 Q. Was any of your other testimony here</p> <p>9 today based on speculation?</p> <p>10 A. No.</p> <p>11 Q. Or assumption that certain facts might</p> <p>12 be true?</p> <p>13 A. No. If it was, I --</p> <p>14 Q. Just that one piece of testimony?</p> <p>15 MR. MURRAY: Let him finish. He wasn't</p> <p>16 done.</p> <p>17 MS. LEVIN: Okay, go ahead.</p> <p>18 MR. MURRAY: You cut him off for about</p> <p>19 the tenth time.</p> <p>20 MS. LEVIN: Go ahead, finish.</p> <p>21 THE WITNESS: If it was, I would have</p> <p>22 stated it in my answer.</p> <p>23 BY MS. LEVIN:</p> <p>24 Q. But that one particular piece of</p> <p>25 testimony that you gave today, you're now providing</p>	<p>1 Q. You haven't discussed a potential</p> <p>2 counterclaim with Mr. Hinton of Rose Acre?</p> <p>3 A. No.</p> <p>4 Q. You've never discussed the Complaint or</p> <p>5 a potential counterclaim with Mr. Krouse?</p> <p>6 A. No. Didn't know about the counterclaim.</p> <p>7 MS. LEVIN: I have no further questions.</p> <p>8 THE VIDEOGRAPHER: Anyone else on the</p> <p>9 phone?</p> <p>10 MR. MURRAY: No, I think that's it.</p> <p>11 Can we designate the entire deposition</p> <p>12 highly confidential under the protective order, and</p> <p>13 don't waive signing.</p> <p>14 THE VIDEOGRAPHER: We are off the record</p> <p>15 at 17:51.</p> <p>16 (Videotaped deposition concluded</p> <p>17 at 5:51 p.m.)</p>
<p>1 this clarification for?</p> <p>2 A. Yes.</p> <p>3 Q. But there's not any other testimony that</p> <p>4 you need to clarify?</p> <p>5 A. Not that I'm aware of.</p> <p>6 Q. Have you discussed the allegations of</p> <p>7 the Complaint with any of your suppliers?</p> <p>8 A. The allegations of the Complaint?</p> <p>9 Q. Yes. Have you discussed the Complaint</p> <p>10 with any of your suppliers?</p> <p>11 MR. MURRAY: Objection; outside the</p> <p>12 scope.</p> <p>13 THE WITNESS: No.</p> <p>14 BY MS. LEVIN:</p> <p>15 Q. Since the Complaint was filed, you've</p> <p>16 not had any conversations with any of your suppliers</p> <p>17 about the allegations of the Complaint?</p> <p>18 MR. MURRAY: Same objection.</p> <p>19 THE WITNESS: No. The only thing that I</p> <p>20 was told, that I was told by Midwest Poultry that</p> <p>21 they had settled their Complaint.</p> <p>22 BY MS. LEVIN:</p> <p>23 Q. You haven't discussed the Complaint with</p> <p>24 Mr. Hinton of Rose Acre?</p> <p>25 A. No.</p>	<p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

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6 the officer before whom the foregoing proceedings
7 were taken, do hereby certify that the foregoing
8 transcript is a true and correct record of the
9 proceedings; that said proceedings were taken by me
10 stenographically and thereafter reduced to
11 typewriting under my supervision; and that I am
12 neither counsel for, related to, nor employed by any
13 of the parties to this case and have no interest,
14 financial or otherwise, in its outcome.

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